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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXII.

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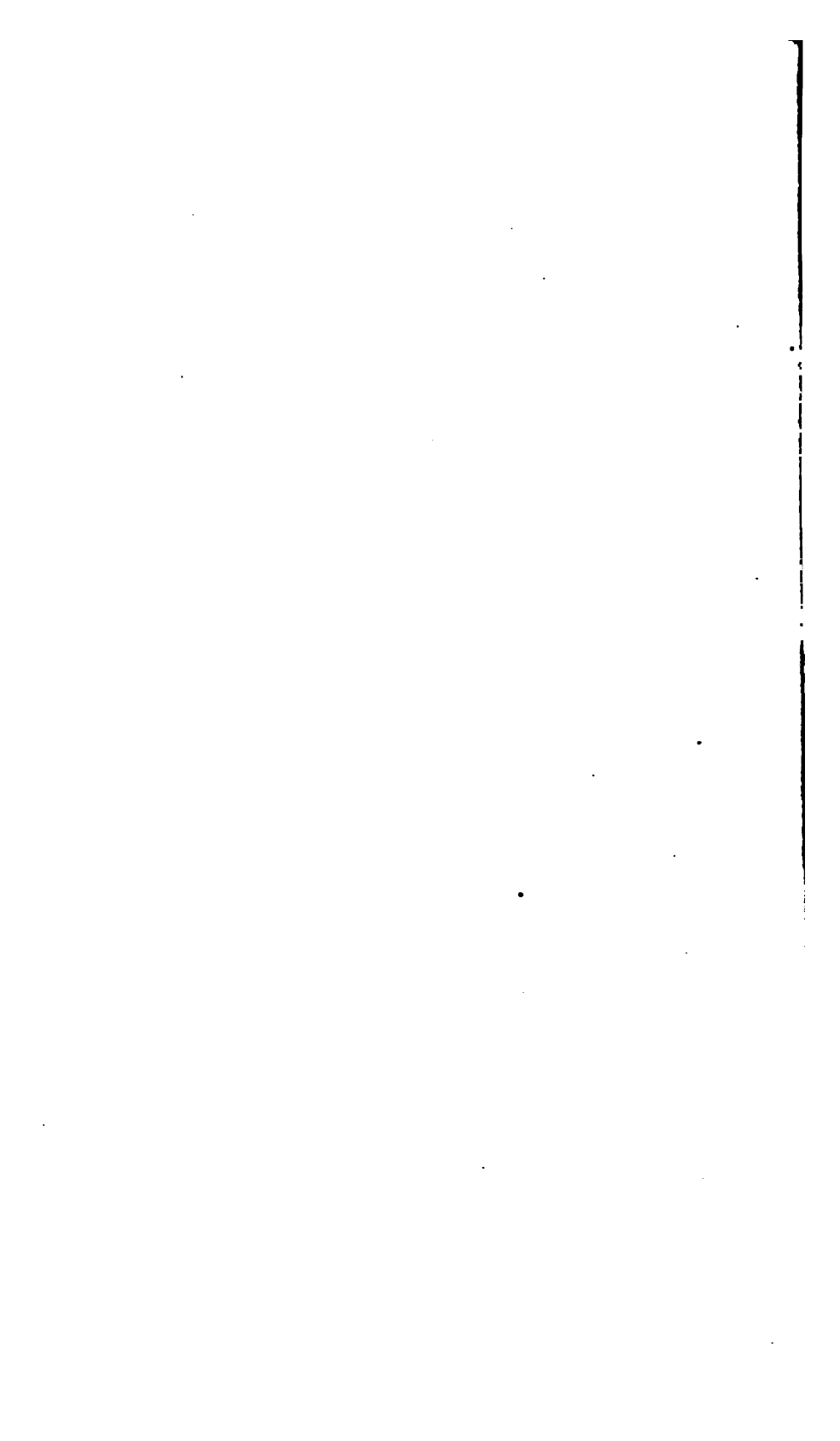
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VOL. LXXII.



CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

TRADERS' NATIONAL BANK v. SOHRR.

[20 WASHINGTON, 1.]

HOMESTEAD—JUDGMENT LIEN.—Under the statutes of the state of Washington, a general personal judgment does not become a lien upon a homestead.

HOMESTEAD—CLAIM OF, WHEN RES JUDICATA.—A judgment bars all defenses which the defendant had an opportunity to make. If a judgment debtor makes a transfer of real property, which his creditor seeks to have set aside as fraudulent, and to have the property subjected to the satisfaction of his judgment by a sale on execution, a claim of homestead would be a complete defense to the action. Therefore, if the debtor permits judgment to be rendered, subjecting his entire interest in the land to the satisfaction of the judgment, without asserting his right to a homestead, the judgment is final, and conclusive of the rights of the parties to the litigation, and he cannot assert such claim in any subsequent proceeding.

Graves, Wolf & Graves, for the appellant.

W. A. Lewis, for the respondents.

⁴ **REAVIS, J.** In November, 1891, appellant obtained judgment in the superior court of Spokane county against respondents, who were then, and are now, husband and wife. At the time, respondents resided upon certain real property in the city of Spokane, which is now of the value of about one thousand dollars, and which was their homestead. After rendition of the judgment against them, respondents conveyed their homestead in moieties by separate deeds to Mrs. Brier and Mrs. Stratton. In 1893, appellant commenced two suits in the superior court, one against the respondents and Mrs. Brier

and the other against the respondents and Mrs. Stratton. The complaint in each suit stated the rendition of the judgment against respondents, and that respondents were husband and wife; that transcript of the judgment was filed with the auditor of Spokane county and duly recorded before the conveyances to Mrs. Brier and Mrs. Stratton were executed; and alleged that the judgment was a lien upon the real estate so conveyed, and that the deeds of conveyance executed by respondents were wholly without consideration and were made for the purpose of evading the judgment, and for the purpose of defrauding the appellant and other creditors of respondents; and that the land at the time of the conveyances was subject to the lien of appellant's judgment, and that respondents had no other property out of which plaintiff could make the judgment, except property described as likewise conveyed and included in the two deeds mentioned; that execution had been issued upon the judgment, but there was no property upon which it could be levied except the realty which is the ⁵ subject of controversy in this action; and the prayer of the complaint was that the judgment be declared a lien upon the real estate mentioned, and that the deeds of conveyance to Mrs. Brier and Mrs. Stratton be set aside as against the judgment of appellant, and for a decree against defendants authorizing and directing the sheriff of Spokane county to sell the real estate upon the execution issued on the judgment for the satisfaction thereof. Respondents, together with Mrs. Brier and husband and Mrs. Stratton and husband, were made defendants, and they all appeared and united in an answer to the complaint. The answer admitted the execution and delivery of the deeds and denied the other material allegations of the complaint. Upon the issues thus made the cause went to trial and evidence was heard, and the court found the rendition of the judgment against respondents, and that said judgment had not been paid and the amount due and owing thereon; that the transcript of the judgment was duly filed and recorded as alleged in the complaint and the conveyance by the deeds as stated in the complaint; and that the judgment was a lien upon the real estate and appellant was entitled to make the same thereon by execution; and on the thirteenth day of October, 1893, a decree was entered that appellant could proceed to sell the real estate on execution upon its judgment, and that the purchaser at such execution sale take all the right and interest owned and possessed by the respondents at the time of the rendition of the judgment, on the 23d

of November, 1891. No exception or appeal was taken to or from the decree. In November, 1893, respondent George F. Schorr duly executed and recorded a declaration of homestead upon the said real estate. On the 17th of March, 1897, the original judgment was duly revived and the lien of judgment continued thereon by decree entered of ^o that date in the superior court, and thereafter execution was issued and the premises sold under said execution, and, upon motion to confirm such sale, the present controversy arose. Upon argument of the cause before this court, all the objections to the jurisdiction of the superior court to consider this controversy in the form in which it was presented were waived by counsel for the respective parties, and the cause is here considered as upon an issue properly made to determine the homestead right in the premises in litigation at this time.

1. The superior court found, and the conceded facts sustain the conclusion, that the realty in controversy was the homestead of respondents when the judgment in favor of appellant was rendered against them in 1891; and a vital question is, Does a general personal judgment become a lien upon a homestead in this state? It is maintained by counsel for respondents that the sale of the property was not made in the manner and form provided by law for the sale of homesteads: 2 Hill's Code, sec. 484; that, on the contrary, the sheriff's return shows that all proceedings prior to the sale were under the statutes for sale of lands other than homesteads: 2 Hill's Code, sec. 496 et seq.; Ballinger's Code, sec. 5269; and counsel contends that the lien of the judgment attaches to all the real estate of the judgment debtor, including the homestead; and in support of such contention cites the case of *McMillan v. Mau*, 1 Wash. 26. In that case, a widow, as administratrix of the estate of her deceased husband, petitioned the probate court to set aside a homestead, but creditors who had obtained a judgment against the deceased and filed a transcript thereof in the auditor's office claimed that the deceased moved upon the land after the lien attached, and such creditors filed objections to the allowance of such homestead, setting up their judgment ^o lien and that the lien took precedence of the homestead claim of the widow. The probate court sustained the priority of the lien over the homestead claim, which view was also sustained by the territorial district court, to which an appeal had been taken, but upon appeal to this court it was said: "We think that, under the laws relating to the selection of homesteads, the action of

the probate and district courts was erroneous; that the obtaining of a general judgment lien does not cut off the subsequent selection of a homestead at any time before sale."

It will thus be observed, from a consideration of the case cited, that the precise question involved in the controversy now here was not ruled upon in that case. It is also contended by counsel that the homestead exemption is a personal privilege, to be exercised by the claimant or not at his will and at any time before sale. As a general rule, the lien of a judgment only attaches to property which there is a present power to sell, and the question must be solved by the statutes relating to homestead exemptions. The state constitution imposes its mandate upon the legislature to protect the homestead from forced sale: Const., art. 19, sec. 1. The statute in force at the time of the rendition of appellant's original judgment against respondents, in 1891, was 2 Hill's Code, section 481, in which a homestead not exceeding in value one thousand dollars was exempted from execution or attachment. By section 482, the homestead passed to the widow surviving the husband, or to the minor children, and the creditor could not have an execution as of course against such homestead: 2 Hill's Code, sec. 484. When the homestead was sold, a subsequent homestead acquired with the proceeds thereof was exempt, and section 485 of 2 Hill's Code (Ballinger's Code, sec. 5247), provided: "In case of the sale of said homestead, any subsequent ^s homestead acquired by the proceeds thereof shall also be exempt from attachment and execution; nor shall any judgment or other claim against the owner of such homestead be a lien against the same in the hands of a bona fide purchaser for a valuable consideration."

A sale of a homestead under execution is void, and the homestead may be conveyed unaffected by such execution sale: *Asher v. Sekofsky*, 10 Wash. 381. The proceeds of exempt property are also exempt from execution: *Puget Sound etc. Packing Co. v. Jeffs*, 11 Wash. 470, 48 Am. St. Rep. 885. The homestead may be mortgaged without affecting the right to claim it thereafter as a homestead: *Wiss v. Stewart*, 16 Wash. 376.

Mr. Freeman observes (1 Freeman on Executions, 2d ed., sec. 249d): "The lien of a judgment and of an execution is almost universally regarded as arising from the right to sell property thereunder. And hence, where the right of sale cannot be asserted, the existence of the lien must be denied. It would follow, as a logical result, from the application of this general principle, that a judgment rendered after the creation and be-

fore the abandonment of a homestead cannot be a lien thereon; . . . If the property was a homestead, and as such exempt from execution, the exemption right is not lost by the transfer of the property to a third person. It cannot be sold in his hands under a judgment against his vendor."

Provision is made by our statutes for reaching the excess in value of real estate claimed as a homestead over the amount exempted, but it is not the ordinary enforcement of the lien or a sale under execution. It is a special mode of sale after an appraisement. We think it is apparent, from an examination of the legislation creating and protecting the homestead in this state, and the construction placed upon such statutes by this court, that a ⁹ general judgment lien does not operate upon, and does not attach to, premises which constitute a homestead, and the view taken by counsel for respondents that such lien may attach to the excess in value above the homestead exemption is erroneous.

2. The effect of the judgment in favor of appellant and against respondents and their grantees, rendered in 1893, may now be considered. Counsel for respondents maintains with much earnestness that the record in those suits does not disclose that the claim of homestead was before the court. It is true that the complaints in each case—and the cases are alike—do not mention the existing encumbrance of the homestead, but they allege that the specific realty is subject to the lien of the judgment, and the object of the suits is specifically stated to enforce the judgment by execution and sale. The respondents appeared and defended on the merits against the claim of appellant in those suits. The judgment of the court was that the premises were subject to the satisfaction of the judgment, and a sale under execution was directed. The judgment became final and conclusive of the rights of the parties to the litigation. Mr. Van Fleet in his work on Former Adjudication, in discussing defenses omitted, thus states the principle: "The sole purpose in view in serving notice upon a person that a judicial proceeding has been commenced against him is to afford him an opportunity to show his causes of defense or reasons why the plaintiff should not recover; and a recovery by the plaintiff necessarily adjudicates that there is no defense. Hence, the cases all agree that a judgment bars all defenses which the defendant had an opportunity to make." And many authorities are cited by him to sustain it: Van Fleet on Former Adjudication, sec. 159.

¹⁰ The case of *Snapp v. Snapp*, 87 Ky. 554, was where creditors claimed the right to subject land conveyed by their debtor to a third party upon the ground that the conveyance was fraudulent, and disregarded the conveyance and had the land levied upon and sold under execution. Thereafter, the grantee in the alleged fraudulent conveyance brought an action to set aside the execution, to which the debtor was a party. Upon trial, the conveyance was held to be fraudulent, and the purchaser at the execution sale obtained the sheriff's deed. The debtor then brought action to recover the land as a homestead. It was ruled by the court that the claim to a homestead asserted in the last action would have been a complete defense to the action in which the creditors asserted the right to subject the land, and, having failed to assert the claim in that action, it could not be asserted in another. The court observed of the claimant: "He gave his deposition in that case [the action to subject the land to the claim of the creditors], and in it testifies that he is a defendant to it. The assertion of his homestead right to the land in that suit would have defeated the claim of the defendants therein that the conveyance by him to the son was fraudulent. If the land was exempt to him as a part of his homestead, he had a right to convey it without claim or objection upon the part of his creditors. He remained silent, however. It has been held that the sale of land under the judgment of a court does not divest the owner of his right to a homestead exemption, unless it has been waived in the manner directed by the statute. He may assert it by an independent suit; but certainly a time should come when he can no longer do so. He cannot sue for it and suffer defeat, and then bring a second action for it by joining his wife with him. He is the owner of the homestead. If he once asserts his right to it by an action and his claim be rejected, this adjudication is a bar to a second suit."

¹¹ *Hill v. Lancaster*, 88 Ky. 338, was an action by creditors of the grantor in a deed, against the grantor and grantees, to set aside the deed as fraudulent, and subject the land to the payment of the grantor's debts. The grantor filed an answer, denying the alleged fraud and asserting that he had no interest whatever in the land. Judgment was rendered, setting aside the deed and subjecting the land, and thereafter the grantor and his wife offered to file their joint petition in the same action, asserting a claim to the homestead in the land. It was determined that, the debtor having permitted judgment to be

rendered subjecting his entire interest in the land without asserting the right to a homestead, it was afterward too late to do so, the judgment being final. It was said by the court in that case: "It is not denied—indeed, it is a fact—that the appellant, as between him and the appellees, Lancaster, et cetera, as his creditors, was entitled to a homestead in said real estate; but his entire interest in this real estate having been sought to be sold to satisfy the demand of these creditors, and he having appeared and defended upon the merits, and having failed to set up his homestead right, which would have been a complete bar to the appellee's action . . . his effort to set up his right to his homestead came too late."

Counsel for respondents has called to the attention of the court the case of Shirland v. Union Nat. Bank, 65 Iowa, 96, and maintains that the case cited sustains his view that the homestead claim was not necessarily adjudicated in the former suits. To some extent the reasoning in the Iowa case apparently trenches on the rule stated in the Kentucky cases, *supra*, but it may be distinguished from them. It was observed by the Iowa court: "The judgment of a court of competent jurisdiction is ¹² conclusive on the parties as to all points directly involved in it and necessarily determined, but is conclusive as to none others. . . . The homestead right of plaintiffs in the premises was in no manner questioned in the proceedings. No complaint is made in the petition with reference to the subject of that right, and no relief is asked as against it. The only complaint related to the fraudulent mortgage and the judgment, which had in fact been satisfied, and the only relief demanded was that the premises be subjected to defendant's judgment, free and clear of all claim in Mott's favor under said mortgage and judgment; and the judgment does not undertake to give any relief except as against the mortgage and judgment complained of."

The original action, which was set up as a bar against the claim of homestead, was instituted to declare fraudulent and void a mortgage and judgment rendered thereon, and the only relief demanded in that action was that the judgment obtained on such mortgage foreclosure be declared void and of no effect as against the attacking creditor. There was no request that the realty be subjected specifically to the creditors' claim, but in the case at bar the specific object of the two suits commenced by appellant against respondents and others, in 1893, was to subject the realty in controversy here to the original

judgment and to have execution issue on such judgment and a satisfaction thereof by sale. The question of the homestead claim of respondents was therefore conclusively determined in the former suits and cannot again be litigated.

The judgment of the superior court is reversed, with direction to enter judgment in favor of appellant.

Scott, C. J., and Anders, Dunbar, and Gordon, JJ., concur.

HOMESTEAD.—A JUDGMENT IS NOT A LIEN upon a homestead: *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567. But compare the extended notes to *Pipkin v. Williams*, 38 Am. St. Rep. 247, and *Vanstory v. Thornton*, 34 Am. St. Rep. 503, for cases holding that a homestead is subject to a judgment lien. A homestead is not subject to a judgment lien unless such lien existed before the homestead right was acquired: *Freiberg v. Walzem*, 85 Tex. 264, 34 Am. St. Rep. 808.

JUDGMENT—CONCLUSIVENESS OF.—As between the parties to it, the conclusiveness of a judgment is not confined to the matter litigated, but includes every other matter which the parties might have litigated and had decided in the case: *Note to Short v. Taylor*, 59 Am. St. Rep. 514.

KINSMAN v. SPOKANE.

[20 WASHINGTON, 112.]

CLOUD ON TITLE—STREET ASSESSMENT.—Under a statute which authorizes an action to quiet title against anyone claiming an interest in land adverse to the owner, an action may be maintained to remove a street assessment as a cloud upon the title, although the assessment is apparently barred by the statute of limitations.

CLOUD ON TITLE—STREET ASSESSMENT—FAILURE TO ALLEGE TENDER DOES NOT RENDER COMPLAINT DEMURRABLE.—In an action to remove a street assessment as a cloud upon title, the complaint is not demurrable because it fails to allege a tender of the amount of the assessment, especially where the statute of limitations has run against the assessment, and it is alleged that the city's claim was, in the first instance, without foundation and wrongful.

Stephens & Bunn, for the appellants.

A. G. Avery, for the respondents.

119 **SCOTT, C. J.** The appellants brought this action to remove a cloud from the title of certain real estate situated in the city of Spokane, and have appealed from a judgment sustaining a demurrer to the complaint. The cloud complained of was a purported assessment on the property for street improvements. Two propositions are set forth by the respond-

ents for sustaining the judgment, one being that the complaint shows upon its face that the statute of limitations had run against the assessment proceedings, and that they were therefore void, and the other that, before the plaintiffs could maintain the ¹²⁰ action, they must tender the amount justly due. In support of the first proposition section 1399 of 3 Pomeroy's Equity Jurisprudence, second edition, is cited, showing such to be the general rule, although it meets the disapproval of the author. But we are of the opinion that it cannot obtain under our statute (2 Hill's Code, sec. 544; Ballinger's Code, sec. 5521), which authorizes an action to quiet title against anyone claiming an interest therein adverse to the plaintiff; and the complaint, in paragraph 8, shows that the defendant city contends that it still has the right to commence suit or proceedings to enforce the assessment.

It is an unquestioned fact that under our present system of registration laws, where the records are so universally and entirely relied upon to show the character of the title, a matter of record adverse to the title of one seeking to convey, although seemingly void on its face, or which apparently could not be enforced in consequence of the statute of limitations, would yet injuriously affect the value of the real owner's title, and he should be permitted to have the same removed as a cloud, where rights adverse to his interests are claimed under it; and, independent of the statute, we should approve of the reasoning of the learned author against the rule.

No authority has been cited holding that, in order to maintain such an action, the plaintiff must tender the amount of the assessment, notwithstanding the fact that the statute of limitations has run against the same. But it is immaterial, whatever the rule may be, for in this case the plaintiff, in paragraph 5 of his complaint, has alleged that the claim of the defendant city was without foundation and wrongful and does not in fact exist, and, as a further and additional reason for its invalidity, pleaded the statute aforesaid. If the city's claim was without foundation and wrongful, that of itself would be a defense against enforcing it, regardless of the statute ¹²¹ of limitations, and no tender of any amount would have been required; nor does it appear by the complaint that anything was justly due against the premises.

The judgment will be reversed and the cause remanded, with instructions to overrule the demurrer, and for further proceedings.

Gordon, Anders, and Reavis, JJ., concur.

Dunbar, J., dissents.

CLOUD ON TITLE—VOID STREET ASSESSMENT.—An action may be sustained to remove, as a cloud upon the plaintiff's title, a street assessment valid upon its face, but void because of informalities in the proceedings preceding it: *Bolton v. Gilleran*, 106 Cal. 244, 45 Am. St. Rep. 33. Compare note to *Helden v. Hellen*, 45 Am. St. Rep. 377.

CLOUD ON TITLE—ACTION TO QUIET TITLE AGAINST TAX SALE CLAIMANT—TENDER—DEMURRER.—If the owner of land brings an action to quiet title against one who claims an interest in the land by virtue of an alleged purchase at a tax sale, and it does not appear upon the face of the complaint, either expressly or by implication of law or fact, that any taxes were or are due upon the land, the complaint is not subject to a general demurrer on the ground that it does not contain an offer to pay whatever taxes may be justly found due on the land: *Clark v. Darlington*, 7 S. Dak. 148, 58 Am. St. Rep. 835.

CAMERON v. GROVELAND IMPROVEMENT COMPANY.

[20 WASHINGTON, 169.]

RECEIVERS—APPOINTMENT OF, PENDENTE LITE—DISCRETION.—The appointment of a receiver pendente lite is a matter committed to the sound discretion of the judge before whom the proceeding is pending.

RECEIVERS—APPOINTMENT—REVIEW OF ON APPEAL.—The appointment of a receiver will not be disturbed on appeal, unless it appears affirmatively to have been unwarranted; and to show this, there must be a clear preponderance of evidence against the propriety of the appointment, as the appellate court will not undertake to weigh the testimony where there is a substantial conflict in it.

RECEIVERS—APPOINTMENT OF, PENDENTE LITE—PLEADING.—A sworn denial of the equities of a complaint for the appointment of a receiver pendente lite does not make a prima facie case for the defendant, unless the answer is a "full and responsive" one under the rules of chancery.

RECEIVERS—CORPORATIONS—MISMANAGEMENT, COLLUSION, AND FRAUD ON CREDITORS.—A court of equity has inherent power to appoint a receiver for the property of a corporation, at the instance of minority stockholders, where it is being fraudulently mismanaged by the officers of the company, and, by reason of such fraud, the corporation is in imminent danger of insolvency.

George H. Jones, Humes & Lysons, and Benton Embree, for the appellants.

Trumbull & Trumbull, for the respondents.

¹⁶⁹ REAVIS, J. Suit in equity by a minority of the stockholders of the appellant corporation, in their own behalf and

that of all the other stockholders who may join them. The object of the suit was to compel an accounting of money and property belonging to the corporation, which the complaint alleges has been fraudulently converted to their own use by the officers of the corporation; and the ¹⁷⁰ further allegation is made that the officers are continuing to convert the money and property to their own use, as pretended salaries and expenses, without any authority therefor and fraudulently. A receiver was prayed for pending the litigation, and that the defendant's officers be enjoined from interfering with the property of the corporation during the pendency of the action. The motion for the appointment of a receiver was made upon the ground of fraud on the part of the officers, and that, by reason of such fraud, the corporation was in imminent danger of insolvency; that the officers controlled the majority of the trustees of the corporation, and that plaintiffs had no relief except in equity. The motion for the appointment of a receiver was based upon the complaint and five affidavits filed therewith. The defendants appeared, and resisted the motion for the appointment of a receiver pending the cause by filing some eight affidavits. The answer was not then filed. The hearing was upon the complaint and affidavits of the respective parties. The superior court appointed a receiver pending the trial of the cause.

The rule which this court observes in reviewing an order of the superior court appointing a receiver has been stated in *Roberts v. Washington Nat. Bank*, 9 Wash. 12: "The making of such orders is committed, under our system, to the sound discretion of the judge before whom the proceeding is pending, and his decision of the question must stand, unless the appellate court, upon an examination of the law and facts of the case, shall affirmatively determine that his action was not warranted; and, in determining this question, the decision of questions of fact will not be reversed if there is a substantial conflict in the proofs in regard thereto. But the appellate court must examine such proofs for the purpose of determining whether or not there is such a clear preponderance against the determination of the lower court."

¹⁷¹ It was held in *Naylor v. Sidener*, 106 Ind. 179, that the supreme court, in determining whether a receiver has been properly appointed, will consider the affidavits and oral evidence properly in the record, as well as the allegations of the complaint, but will not overrule or interfere with the discretion of the trial court on the mere weight of evidence.

Appellants cite the case of *Whitehouse v. Point Defiance etc. Ry. Co.*, 9 Wash. 558, to the effect that a sworn answer denying all the equities of the bill amounts in practice, on the hearing of such application, to a *prima facie* case in favor of the defendants. It is true, as observed in *Beach on Receivers*, section 151: "The reason for this rule has been stated to be that 'the plaintiff, having addressed himself to the conscience of the defendant, has made him a witness and must take his answer as true, unless he can overcome it'"; and a number of authorities are cited to the effect that it is a general rule that a receiver will not be appointed in a case where the equities of the plaintiff's bill are fully denied by the sworn answer of the defendant. But the answer mentioned by Mr. Beach was the full and responsive one under the rules of chancery.

"An answer," says Judge Story (*Story's Equity Pleading*, 10th ed., sec. 852), "must be full and perfect to all the material allegations in the bill. It must confess, avoid, deny, or traverse all the material parts of the bill. It must state facts and not arguments. It is not sufficient that it contains a general denial of the matters charged": See, also, 1 *Ency. of Pl. & Pr.* 875, 876.

The affidavits on the part of defendants at the hearing, upon the motion to appoint a receiver, contain many literal denials of the allegations of the complaint, and in some instances conclusions of law, and in several instances are not full and explicit in explanations in answer to charges ¹⁷² in the complaint. But it would not be profitable to review the testimony in the form of affidavits before the court. There is not a clear preponderance for defendants, and this court cannot undertake to weigh the testimony, as heretofore announced. The facts are specifically stated in the complaint, and, if true, plaintiffs are entitled to the relief demanded. *Beach on Receivers*, *Alderson's* edition, section 86, states the rule: "If the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, or mismanagement and waste, courts of equity have inherent power to appoint receivers": *Morawetz on Private Corporations*, sec. 281; 20 *Am. & Eng. Ency. of Law*, 272; *Hawes v. Oakland*, 104 U. S. 450.

The judgment of the superior court is affirmed.

Scott, C. J., and Anders, Dunbar, and Gordon, JJ., concur.

When It is Proper to Appoint a Receiver.*

Grounds of Appointment, Generally.—A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, and its rents, issues, and profits, and apply or dispose of them at the direction of the court, when it does not seem reasonable that either party should hold them: *Baker v. Backus*, 32 Ill. 79. And it is our purpose, in this note, to present a general survey of the American decisions of the courts of last resort, discussing the grounds on which a receiver may be appointed. The multitude of authorities on the subject, and their magnitude of detail as to facts, when considered in connection with the limits of this note, will prevent us from going deeply into the minute ramifications of the question as to what particular facts will justify the appointment of a receiver, but we shall attempt to give the controlling principles, with enough illustration to make them clear. The appointment of a receiver is part of the jurisdiction of equity, and is based on the inadequacy of the remedy at law, being intended to prevent injury to the thing in controversy, and to preserve it, *pendente lite*, for the security of all parties in interest, to be finally disposed of as the court may direct: *Folsom v. Evans*, 5 Minn. 418; *Bank v. Duncan*, 52 Miss. 740; *Mays v. Rose*, Freem. Ch. 703. The power of appointing a receiver is of a high and extraordinary character, and will be exercised by courts with the utmost caution, and only under such special circumstances as demand summary relief. The power is limited, almost exclusively, to cases where it is necessary either to prevent fraud, to save the subject of litigation from material injury, or to rescue it from threatened destruction; and it is not proper to appoint a receiver, in any case, where there is no fraud or imminent danger of the property sought to be reached being lost, injured, diminished in value, destroyed, squandered, wasted, or removed from the jurisdiction. But, on the contrary, if there is imminent danger of loss, through mismanagement, fraud, or otherwise, the appointment of a receiver is authorized: *Crawford v. Ross*, 39 Ga. 44; *Furlong v. Edwards*, 3 Md. 112; *Speights v. Peters*, 9 Gill, 472; *Blondheim v. Moore*, 11 Md. 365; *Baker v. Backus*, 32 Ill. 79; *State v. Ross*, 122 Mo. 435; *Venable v. Smith*, 98 N. C. 523; *Mays v. Rose*, Freem. Ch. 703; *Ellett v. Newman*, 92 N. C. 519; *Pelzer v. Hughes*, 27 S. C. 408; *Hanna v. Hanna*, 89 N. C. 68; *Dozier v. Logan*, 101 Ga. 173. A receivership will not, however, be granted upon a mere allegation of danger to the property. The facts must be stated from which the danger appears: *Hanna v. Hanna*, 89 N. C. 68.

The pendency of a suit is generally essential to authorize the appointment of a receiver, save in the cases of infants, idiots, and luna-

*REFERENCE TO MONOGRAPHIC NOTES.

When and over what property a receiver will be appointed: 64 Am. Dec. 482-496.
 Dissolution of partnership by decree: 98 Am. Dec. 269-271.
 Proceedings supplemental to execution: 100 Am. Dec. 512, 513.
 Mortgagee's right to rents and to a receiver to secure their payment: 27 Am. St. Rep. 793-794.

tics: *Crowder v. Moone*, 52 Ala. 220; *Baker v. Backus*, 32 Ill. 79; *Merchants' etc. Bank v. Circuit Judge*, 43 Mich. 292; *Jones v. Schall*, 45 Mich. 379; *Hardy v. McClellan*, 53 Miss. 507; *State v. Union Nat. Bank*, 145 Ind. 209, 57 Am. St. Rep. 209; *Jones v. Bank*, 10 Colo. 464, 473. But a special appearance is a step in a pending action, and there may be a pending action so as to authorize the appointment of a receiver, although the notice or service is defective: *Hellebush v. Blake*, 119 Ind. 349, 351.

To authorize the appointment of a receiver, the petitioner must also show either a clear legal right in himself to the property in controversy, or that he has some lien upon or property right in it, or that it constitutes a special fund out of which he is entitled to satisfaction of his demand. It is essential, to authorize the exercise of such jurisdiction, for the complainant to show that he has a present existing interest in the property. The complainant must have an apparent cause of action, upon which there is a likelihood of recovery, coupled with the fact of imminent danger or peril to the property: *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209; *Fort Payne etc. Co. v. Fort Payne etc. Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109; *Albany etc. Steel Co. v. Southern Agr. Works*, 76 Ga. 135, 2 Am. St. Rep. 26; *Chase's case*, 1 Bland, 206, 17 Am. Dec. 277; *O'Mahoney v. Belmont*, 62 N. Y. 133, 143; *Goshen Woolen Mills v. City Nat. Bank*, 150 Ind. 279; *Elwood v. First Nat. Bank*, 41 Kan. 475; *Ryder v. Bateman*, 93 Fed. Rep. 16; *Steele v. Aspy*, 128 Ind. 367; *Flagler v. Blunt*, 32 N. J. Eq. 518, 523; *Howell v. Ripley*, 10 Paige, 43, 46; *Norris v. Lake*, 89 Va. 513; *Cofer v. Echerson*, 6 Iowa, 502, 505; *Ogden City v. Bear Lake etc. Irr. Co.*, 16 Utah, 440; *Wilkinson v. Dobbie*, 12 Blatchf. 298; *Twitty v. Logan*, 80 N. C. 69; *Levenson v. Elson*, 88 N. C. 182; *Willis v. Corlies*, 2 Edw. Ch. 281, 287; *Orphan Asylum v. McCartee*, Hopk. Ch. 429, 435; *Clark v. Ridgely*, 1 Md. Ch. 70, 71; *Blondheim v. Moore*, 11 Md. 365, 374. It is not proper to appoint a receiver on the petition of one whose complaint shows no right of ultimate recovery in the action: *Goshen Woolen Mills Co. v. City Nat. Bank*, 150 Ind. 279; but a claim of the whole title is not necessary. A receiver may be appointed on the application of one who has only a part interest in the property involved: *Chase's case*, 1 Bland, 206, 17 Am. Dec. 277.

Hence, one who seeks the appointment of a receiver must show that he has either a clear right to the property itself, some lien upon it, or that it constitutes a special fund to which he has a right to resort for the satisfaction of his claim, and that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in imminent danger of loss from neglect, waste, mismanagement, misconduct, or insolvency of the defendant: *Mays v. Rose*, Freem. Ch. 718; *Orphan Asylum v. McCartee*, Hopk. Ch. 429, 435; *Rheinstein v. Bixby*, 92 N. C. 307; *Levenson v. Elson*, 88 N. C. 182; *Flagler v. Blunt*, 32 N. J. Eq. 518, 523; *Beecher v. Bininger*, 7 Blatchf. 173. The application must be supported by evidence showing that the appointment of a receiver

is necessary: *Haines v. Carpenter*, 1 Woods, 262; and the court must be satisfied from the verified complaint, affidavit, or other evidence, that a receiver is necessary to preserve the property: *Blondheim v. Moore*, 11 Md. 865; *Clark v. Ridgely*, 1 Md. Ch. 70; *Sullivan etc. Power Co. v. Blue*, 142 Ind. 407. If the equity of a bill for a receiver is denied, there is nothing left upon which to sustain the motion for such appointment, and, if the plaintiff wishes to succeed, he must introduce evidence to disprove the answer: *Simmons v. Henderson*, *Freem. Ch.* 493, 500; *Thompson v. Diffenderfer*, 1 Md. Ch. 489, 495; *Cohen v. Meyers*, 42 Ga. 46, 49; *Rhodes v. Lee*, 32 Ga. 471; *Henn v. Walsh*, 2 Edw. Ch. 129, 130. The appointment is made, generally, either to prevent fraud, protect property from injury, or preserve it from destruction, but the mere allegation of the facts is not sufficient to authorize a court to make the appointment. The plaintiff must establish such facts, and make out a strong case for relief before the appointment will be made: *Baker v. Backus*, 32 Ill. 79; *Henshaw v. Wells*, 9 Humph. 568; *Barkhurst v. Kinsman*, 2 Blatchf. 78; *Crane v. McCoy*, 1 Bond, 422; *Brundage v. Home etc. Assn.*, 11 Wash. 277. A mere showing on information and belief of the party, or of his attorney, will not be sufficient: *Haines v. Carpenter*, 1 Woods, 262. The court must look to the facts stated in the application: *Steele v. Aspy*, 123 Ind. 367; and, if the case requires it, a receiver may be appointed, though the bill contains no prayer for a receiver: *Shannon v. Hanks*, 88 Va. 338, 340. A receiver will not be appointed in an improper case, though both parties consent: *Whelpley v. Erie R. Co.*, 6 Blatchf. 271.

A party who applies for a receiver must show diligence. His motion is objectionable, and will often be denied where there has been laches in making the application: *Hager v. Stevens*, 6 N. J. Eq. 374, 446; *Tibbals v. Sargeant*, 14 N. J. Eq. 449.

It is not proper to appoint a receiver where the rights of third persons have intervened, and which cannot be adjudicated in this summary and collateral method: *Levi v. Karrick*, 13 Iowa, 344, 352. Nor should a receiver be appointed on the application of a party who has a complete and adequate remedy at law: *Cofer v. Echerson*, 6 Iowa, 502, 505; *Rice v. St. Paul etc. R. R. Co.*, 24 Minn. 467; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 401, 408. A court "will not help those who have power to help themselves": *Sollory v. Leaver*, L. R. 9 Eq. 22, 25. A court of equity may refuse to listen to an objection that it could not obtain jurisdiction to appoint a receiver, on the ground that the plaintiff had a plain, adequate, and complete remedy at law, where there has been great laches in making it, because good faith and the early assertion of rights are as essential on the part of a defendant in equity as they are on the part of the complainant: *Brown v. Lake Superior Iron Co.*, 134 U. S. 530. A receiver will not be appointed where property has been disposed and there are no assets: *Texas etc. Ry. Co. v. Gay*, 86 Tex. 571. A receiver, in such a case, would be useless: *Mercantile etc. Trust Co. v. River*

Plate etc. Co. (1892), 2 Ch. 303. Neither is a receiver proper where the bill shows that the defendant is solvent and there is no fraud: Buckley v. Baldwin, 69 Miss. 804; Einstein v. Lee, 89 Ga. 130. And the appointment of a receiver is void where the court has no jurisdiction of the subject matter. It has no power, in such a case, and cannot put assets into the possession and control of a receiver, and this applies where the court is not authorized to grant the ultimate relief prayed for in the bill: People v. Weigley, 155 Ill. 491.

A receiver should never be appointed merely on the ground that the measure can do no harm: Orphan Asylum v. McCartee, Hopk. Ch. 429, 435; Blondheim v. Moore, 11 Md. 365; though it seems to have been done in Robinson v. Taylor, 42 Fed. Rep. 803. So a receiver cannot be appointed for the property of an individual, or corporation, at the instance of a creditor, when no action is pending, and the appointment of such receiver is the only relief sought: State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209. A person cannot have a receiver appointed over his own property, and this applies to corporations, insolvent and otherwise: Note to Cortelyou v. Hathaway, 64 Am. Dec. 486; In re Moss Cigar Co., 50 La. Ann. 789; Jones v. Bank, 10 Colo. 464, 430; Whitney v. Hanover Nat. Bank, 71 Miss. 1009; State v. Ross, 122 Mo. 435, 461. In other words, a receiver will not be appointed, as against a complainant, upon the application of a defendant: Leddel v. Starr, 19 N. J. Eq. 159, 164; State v. Ross, 122 Mo. 435, 461. Compare Steele Lumber Co. v. Laurens Lumber Co., 98 Ga. 329. Receivers can never be lawfully appointed unless deemed necessary for the preservation of property, the preservation or enforcement of rights of persons having claims against it, or to have it applied to some lawful purpose from which it has been or is likely to be diverted if the court does not take possession of it through a receiver, and so cause it to be managed as may be deemed by the court most beneficial to all persons interested, having due regard to fixed rights: Texas etc. Ry. Co. v. Gay, 86 Tex. 571, 582. Compare In re Moss Cigar Co., 50 La. Ann. 789, 794.

The appointment of a receiver is authorized where there is no competent person entitled to hold the property, or, if competent, he is wasting, misapplying, or otherwise putting it in peril, and the complainant has an equitable interest therein: Skinner v. Maxwell, 66 N. C. 45, 48; Vose v. Reed, 1 Woods, 647, 650. A receiver is proper if the property is in danger, "and this principle reconciles the cases found in the books": Orphan Asylum v. McCartee, Hopk. Ch. 429, 435; State v. Northern Cent. Ry. Co., 18 Md. 193, 215.

The court may appoint a temporary receiver pendente lite, but the complaint must state a cause of action for such appointment: Sullivan Electric etc. Power Co. v. Blue, 142 Ind. 407. Yet a temporary receivership cannot be made to last three months without a hearing given: St. Louis etc. R. R. Co. v. Wear, 135 Mo. 230. A provisional receiver may be appointed without a statement in detail of all the grounds therefor in the plaintiff's petition; but it is necessary that

the action should be one in which a provisional receiver may be appointed: *Elwood v. First Nat. Bank*, 41 Kan. 475. That a bill for an ancillary receivership may be entertained, and acted upon, generally, if not always, on ex parte proceedings, and without argument, see *Platt v. Philadelphia etc. R. R. Co.*, 54 Fed. Rep. 569, showing a want of uniformity in the practice as to this point. The appointment of a receiver as a substitute for the plaintiff, instead of a city, to sue on fraudulent contracts is unauthorized, and a nullity: *Burnes v. Atchison*, 48 Kan. 507. If a receiver fails to qualify, another may be appointed in his stead: *In re Louisiana etc. Co.*, 35 La. Ann. 196; upon the death of a receiver, a new one may be appointed: *Nicoll v. Boyd*, 90 N. Y. 516; *Smith v. Harris*, 135 Ind. 621. Additional receivers may be appointed, but this should not be done except in cases of necessity: *Wabash etc. Ry. Co. v. Central Trust Co.*, 22 Fed. Rep. 272. It is a common practice to extend receiverships over other property in which an equitable interest is claimed: *Mercantile Trust Co. v. Missouri etc. Ry. Co.*, 41 Fed. Rep. 8; but where different receivers, at the instance of several creditors, have been appointed, each over a distinct portion of the defendant's property, the court will remove all the receivers except one, who will be retained for the benefit of all parties: *Kelly v. Rutledge*, 8 I. R. Eq. 228. A receiver should not be reinstated, after dismissal, to realize money to pay off debts: *Conquest v. National Bank*, 97 Ga. 500. Nothing more is adjudged by the appointment of a receiver than that it is deemed improper for either party to hold the fund or property. The appointment is provisional. The receiver is regarded as an officer of the court, and the fund as in custodia legis: *Bank v. Duncan*, 52 Miss. 740; *Reisner v. Gulf etc. Ry. Co.*, 89 Tex. 656, 59 Am. St. Rep. 34; *Green v. Coast Line R. R. Co.*, 97 Ga. 15, 54 Am. St. Rep. 379. The proper time to present reasons why a receiver should not be appointed is when the application for his appointment is made: *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 369, 66 Am. St. Rep. 653. A court of equity should adapt its practice, including that governing the appointment of receivers, as far as possible to the existing state of society, and apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and should not, from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy: *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407.

Discretion of Court.—The appointment of a receiver is not a matter of right. The court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well-established principles. It is in that sense only that a receiver can be said to be ex debito justitiæ. The application for his appointment is addressed to the sound discretion of the court, and, while this proposition does not "teach much," it is gathered from the authorities that the dis-

cretion is not arbitrary or absolute, but is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and subject matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding. Furthermore, this discretion is to be exercised with great caution and circumspection, and only in cases where there is fraud or spoliation, or imminent danger of the loss of the property, if the immediate possession should not be taken by the court: *Smith v. Port Dover etc. Ry. Co.*, 12 Ont. App. 288, 290; *Fort Payne etc. Co. v. Fort Payne Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109; *Simmons Hardware Co. v. Walbel*, 1 S. Dak. 488, 36 Am. St. Rep. 755; *Davis v. United States etc. Light Co.*, 77 Md. 35, 40; *Steinberger v. Independent Loan etc. Assn.*, 84 Md. 625, 636; *Owen v. Homan*, 4 H. L. Cas. 997, 1032; *Vose v. Reed*, 1 Woods, 647, 650; *Rapp v. Reehling*, 122 Ind. 255; *Rankin v. Rothschild*, 78 Mich. 10; *Wilcox v. Dunlap*, 83 Ga. 417; *Pendleton v. Johnson*, 85 Ga. 840; *Bliley v. Taylor*, 86 Ga. 163; *Metropolitan Rubber Co. v. Atlanta Rubber Co.*, 89 Ga. 28; *Sanders v. Slaughter*, 89 Ga. 84; *Fluker v. Emporia etc. Ry. Co.*, 48 Kan. 577; *McNair v. Gourrier*, 40 La. Ann. 353; *Buckley v. Baldwin*, 69 Miss. 804; *Baker v. Backus*, 82 Ill. 79, 95; *Clark v. Ridgely*, 1 Md. Ch. 70; *Thompssen v. Diffenderfer*, 1 Md. Ch. 489, 493; *Walker v. House*, 4 Md. Ch. 39, 45; *Latham v. Chafee*, 7 Fed. Rep. 525; *Furlong v. Edwards*, 3 Md. 99, 112; *State v. Northern Cent. Ry. Co.*, 18 Md. 193, 214; *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 35, 47; *Chicago etc. Min. Co. v. United States Petroleum Co.*, 57 Pa. St. 83, 91; *Farmers' Loan etc. Co. v. Chicago etc. Ry. Co.*, 27 Fed. Rep. 146, 158; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Nichols v. Perry Patent Arms Co.*, 11 N. J. Eq. 126; *Mays v. Rose*, *Freem. Ch.* 703, 718; *Tysen v. Wabash Ry. Co.*, 3 Biss. 253; note to *Cortelyou v. Hathaway*, 64 Am. Dec. 482.

"The high prerogative act of taking property out of the hands of one, and putting it in pound, under the order of a judge, ought not to be taken, except to prevent manifest wrong, imminently impending. And when the judge, on the coming in of the answer, finds that the danger is not imminent, and that there was no pressing necessity for the order, it is very proper for him to revoke or modify the order on such terms as he thinks wise": *Crawford v. Ross*, 39 Ga. 44, 49, per McCay, J. A receivership is regarded as a "severe remedy," because it divests the owner of property of its possession before a final hearing, and is not to be adopted save in a strong case, and never unless the plaintiff would otherwise be in danger of suffering irreparable loss: *Latham v. Chafee*, 7 Fed. Rep. 520, 526; *Speights v. Peters*, 9 Gill, 472, 476; *In re Colvin*, 3 Md. Ch. 278, 301. "The application for a receiver is addressed to the sound discretion of the court, regulated by legal principles, and is exercised by the courts, upon many occasions, with great benefit to the parties. It is particularly serviceable when there is danger that the

subject matter of controversy may be wasted and destroyed, impaired, injured, or removed during the progress of the suit. The object is to secure the fund for the party found upon final hearing to be entitled, and to produce as little prejudice as possible to any of those concerned. When one party has a clear right to the possession of property, and when the dispute is as to the title only, the court would very reluctantly disturb that possession. But when the property is exposed to danger and to loss, and the party in possession has not a clear legal right to the possession, it is the duty of the court to interpose and to have it secured": *Lenox v. Notrebe*, Hemp. 225, 226, per Clayton, J. So, it has been said in the house of lords, respecting the appointment of a receiver to preserve the property pending the litigation which is to decide the right of the litigant parties, that: "In such cases the court must, of necessity, exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the court will or will not interfere by this kind of interim protection of the property. Where, indeed, the property is, as it were, in medio, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the ecclesiastical court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to anyone by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The court, by taking possession at the instance of the plaintiff, may be doing a wrong to the defendant—in some cases, an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may, by its interim interference, have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case": *Owen v. Homan*, 4 H. L. Cas. 997, 1032. It is well remarked by McFarland, J., in *Fischer v. Superior Court*, 110 Cal. 129, 139, "that the appointment of a receiver to take property and business out of the hands of persons in possession and claiming ownership thereof, without requiring a bond from the plaintiff in the action, would, in most cases, be a gross abuse of discretion."

Notice.—A court of equity has the power to appoint a receiver without notice having been given to the defendant, but this power should be sparingly exercised except when the necessity is urgent: *Elwood v. First Nat. Bank*, 41 Kan. 475. When notice is required

by statute, it must, of course, be given: *Winchester etc. Light Co. v. Gordon*, 143 Ind. 681; *Whitehead v. Wooten*, 43 Miss. 523; *Ober v. Excelsior Mfg. Co.*, 44 La. Ann. 570; *State v. Second etc. Dist. Ct.*, 20 Mont. 284; *Longstaff v. Hurd*, 66 Conn. 350; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209. But, by the established practice, independent of statute, courts of equity, being averse to interference *ex parte*, will entertain, in ordinary cases, an application for the appointment of a receiver only after notice or rule to show cause: *Moritz v. Miller*, 87 Ala. 331, 332; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438, 450; *Buckley v. Baldwin*, 69 Miss. 804; *Fricker v. Peters*, 21 Fla. 254; *Moyers v. Colner*, 22 Fla. 422; *Capital City Water Co. v. Weatherly*, 108 Ala. 412; *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Grandin v. La Bar*, 2 N. Dak. 206; *Wabash R. R. Co. v. Dykeman*, 133 Ind. 56, 65; *Devoe v. Ithaca etc. R. R. Co.*, 5 Paige, 521; *Weems v. Lathrop*, 42 Tex. 207, 211; *French v. Gifford*, 30 Iowa, 148, 160; *Mays v. Rose*, *Freem. Ch.* 703, 720; *Bisson v. Curry*, 35 Iowa, 72; note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 483. The exceptional cases are when the defendant is beyond the jurisdiction of the court, or cannot be found, or when some emergency is shown rendering interference, before there is time to give notice, necessary to prevent waste, destruction, or loss, or when notice itself will jeopardize the delivery of the property, over which the receivership is extended, in obedience to the order of the court. When the statute is silent as to what constitutes a good reason for the failure to give notice, precedents and adjudged cases under the general practice must be the guide. And in every case where the court is asked to deprive the defendant of the possession of his property without a hearing or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which such application is founded: *Moritz v. Miller*, 87 Ala. 331, 332; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438, 450; *Buckley v. Baldwin*, 69 Miss. 804; *French v. Gifford*, 30 Iowa, 148; *Fricker v. Peters*, 21 Fla. 254; *Moyers v. Colner*, 22 Fla. 422; *Thompson v. Tower Mfg. Co.*, 87 Ala. 733; *Hendrix v. American etc. Mortgage Co.*, 95 Ala. 313; *Wabash R. R. Co. v. Dykeman*, 133 Ind. 56, 65; *Weems v. Lathrop*, 42 Tex. 207, 211; *Blondheim v. Moore*, 11 Md. 365; *French v. Gifford*, 30 Iowa, 148, 160; *Howe v. Jones*, 57 Iowa, 130; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 396; *Sims v. Adams*, 78 Ala. 395, 397; note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 483.

If the facts justify it, a receiver may, of course, be appointed without notice: *Nicoll v. Boyd*, 90 N. Y. 516; *Davis v. Browne*, 2 Del. Ch. 188; *Dilling v. Foster*, 21 S. C. 334; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 396; *Sims v. Adams*, 78 Ala. 395, 397; *Ashurst v. Lehman*, 86 Ala. 371; *Maynard v. Railey*, 2 Nev. 813; but if they do not, the appointment without notice will be declared erroneous: *Meridian News Co. v. Diem*, 70 Miss. 695; *Buckley v. Baldwin*, 69 Miss. 804; *Blondheim v. Moore*, 11 Md. 365, 375; *Triebert v. Burgess*, 11 Md. 452, 465; *Nusbaum v. Myer*, 12 Md. 315, 322; *French v. Gifford*, 30 Iowa,

148, 167; Turgeau v. Brady, 24 La. Ann. 348; State v. Second etc. Dist. Ct., 20 Mont. 284; Howe v. Jones, 57 Iowa, 130; Rogers v. Dougherty, 20 Ga. 271.

A court of chancery has no more power than any other court to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it: Arnold v. Bright, 41 Mich. 207, 210. It should, therefore, exercise extreme caution in the appointment of receivers on *ex parte* applications, and be careful that a proper case is presented before it acts; and it should not be done without notice to the party, whose property is to be affected, except in cases of the greatest emergency demanding the immediate interference of the court: Ruffner v. Mairs, 33 W. Va. 655, 663. Notice of the application for the appointment, and the officer to whom it will be submitted, must be given, or a good reason shown for the failure to give it: Ashurst v. Lehman, 86 Ala. 370, 371. It should be a strong case of emergency and peril, well fortified by affidavits, to authorize the appointment of a receiver without notice to the other party: Thompson v. Tower Mfg. Co., 87 Ala. 733, 734; State v. Jacksonville etc. R. R. Co., 15 Fla. 201. A court is not justified in appointing a receiver *ex parte*, unless there is immediate danger to the property, without it is taken into the custody of the court, and where delay in granting the relief might entirely defeat the object sought: Chicago etc. Ry. Co. v. Cason, 133 Ind. 49, 51; State v. Jacksonville etc. R. R. Co., 15 Fla. 201. A receiver will not be appointed without notice where a temporary injunction or restraining order would be sufficient to protect the rights of the plaintiff: Fischer v. Superior Court, 110 Cal. 129; State v. Jacksonville etc. R. R. Co., 15 Fla. 201. It is not necessary to give previous notice of a motion for the appointment of a receiver, where counsel for the opposite party are present in court: McLean v. Lafayette Bank, 3 McLean, 503. When, in an action to foreclose a mortgage against a mortgagor and his assignee, the mortgagee asks that a receiver be appointed without notice, for the reason, as he alleges, that his security will be impaired because such assignee will not prevent a sale of buildings and machinery on the mortgaged premises under a pretended chattel mortgage, the application for the appointment of the receiver should be denied, when the assignee avers in his answer that he has refused to allow, and has obtained an injunction against such sale, and has instituted suit to have the chattel mortgage declared void: Hutchinson v. First Nat. Bank, 133 Ind. 271, 86 Am. St. Rep. 537.

It has been held that the appointment of a receiver of the property of a person, made without notice to him of the application therefor, is void, though the statute of the state wherein the appointment is made is silent upon the subject of such notice, but that where imperative necessity exists for immediate action, a temporary receiver may, perhaps, be appointed to act as such until notice can be given of the application: Larsen v. Winder, 14 Wash. 109, 53 Am. St. Rep. 864. Sufficient cause, within the meaning of a statute which

forbids the appointment of a receiver without notice to the adverse party, except upon sufficient cause shown by affidavit, is not shown where it affirmatively appears that notice could easily have been given, and it does not appear, either by affidavit or from the verified complaint, that irreparable injury, or any other kind of damages, would have resulted by giving notice of the application: *Sullivan etc. Power Co. v. Blue*, 142 Ind. 407, 418. Under the existing law of Missouri, no temporary receivership can rightly be set up to last for the period of three months, without affording first a hearing to the party whose possession of property is determined by such order: *St. Louis etc. R. R. Co. v. Wear*, 135 Mo. 230, 261. In a case of urgent necessity, it is no valid objection to the appointment of a receiver that some of the parties in interest are not before the court, and that others have had no notice of the application: *Micou v. Moses*, 72 Ala. 439, 442.

Time of Appointment.—As the power to appoint receivers can only be exercised in a pending suit, and as the filing of a bill is the commencement of a suit, the appointment of a receiver in vacation, before the filing of a bill, is without jurisdiction and void, and a subsequent filing of the bill cannot impart any validity to such appointment. There is no authority for the appointment of a receiver before an action is commenced: *Harwell v. Potts*, 80 Ala. 70; *Gold Hunter etc. Co. v. Holleman*, 2 Idaho, 839; *Guy v. Doak*, 47 Kan. 236; *Jones v. Schall*, 45 Mich. 379; though it may be exercised in vacation, after a suit has been commenced, where such exercise may be important to the ends of justice: *Smith v. Butcher*, 28 Gratt. 144, 151; or where the statute authorizes such appointment in vacation: *Hammock v. Loan & Trust Co.*, 105 U. S. 77; *Pressley v. Harrison*, 102 Ind. 14, 18.

By the ancient practice of the court of chancery in England, a receiver was not appointed until after the coming in of the defendant's answer, but it is now settled, both in this country and in England, that the appointment may be made before answer, provided a special necessity therefor is shown to exist. Otherwise, the court will not interfere until after the answer is filed: *Weis v. Goetter*, 72 Ala. 259, 260; *Pressley v. Harrison*, 102 Ind. 14, 18; *Scott v. Becher*, 4 Price, 346; *French v. Gifford*, 30 Iowa, 148, 161; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 450; *Clark v. Ridgely*, 1 Md. Ch. 70, 71; *Jones v. Dougherty*, 10 Ga. 273, 281; *Bloodgood v. Clark*, 4 Paige, 574, 577; *West v. Swan*, 3 Edw. Ch. 420; *Whitehead v. Wooten*, 43 Miss. 523, 526; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 397; *Williams v. Jenkins*, 11 Ga. 595, 597; *Johns v. Johns*, 23 Ga. 31, 36; *Baker v. Backus*, 32 Ill. 79, 116; *Blondheim v. Moore*, 11 Md. 374; *Haight v. Burr*, 19 Md. 130; *Voshell v. Hynson*, 26 Md. 83, 98; *Brinkman v. Ritzinger*, 82 Ind. 358, 363; *Micou v. Moses*, 72 Ala. 439; *Williamson v. Wilson*, 1 Bland, 418, 422; *Bank v. Schermerhorn*, *Clarke Ch.* 214, 216; *Brick Co. v. Robinson*, 55 Md. 410, 418; *Latham v. Chafee*, 7 Fed. Rep. 525, 529; *Beecher v. Bininger*, 7 Blatchf. 170, 173; *Probasco v. Probasco*, 30 N. J. Eq. 108.

A receiver may, therefore, be appointed before a hearing: *Brinkman v. Ritzinger*, 82 Ind. 358, 363; *Merrill v. Elam*, 2 Tenn. Ch. 513, 515; *Sandford v. Sinclair*, 8 Paige, 373. But, where the propriety of the appointment is the principal question involved in the whole controversy, and the appointment is required, if at all, by the view which the court shall ultimately take of the case, as part of the means which should be taken to afford the relief contemplated by the decree, a receiver will not be appointed on the coming in of the answer, but action will be deferred until the hearing: *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. Rep. 283, 293. The appointment of a receiver after a special appearance is proper: *Hellebush v. Blake*, 119 Ind. 349; or while a demurrer or plea to the bill is pending: *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 396; *Howard v. Palmer*, Walk. Ch. 391; unless the right to file the bill is put in issue: *Cook v. Detroit etc. R. R. Co.*, 45 Mich. 453; and a receiver may be appointed, in a proper case, before the service of process: *People v. Norton*, 1 Paige, 17; *Maynard v. Bailey*, 2 Nev. 313.

A receiver, in a proper case, such as one of emergency or urgent necessity, may be appointed at the hearing: *Merrill v. Elam*, 2 Tenn. Ch. 513, 515; *Whitney v. Buckman*, 26 Cal. 447; and a receiver may also be appointed after decree or judgment, if the facts of the case are such as to warrant it, without the filing of a supplemental bill, as where it is necessary to prevent a waste, destruction, injury to, or removal of, the property in controversy, or other act whereby the effectiveness of the decree may be threatened: *Merrill v. Elam*, 2 Tenn. Ch. 513, 515; *Whitney v. Buckman*, 26 Cal. 448; *Brinkman v. Ritzinger*, 82 Ind. 358, 363; *Connelly v. Dickson*, 76 Ind. 440, 444; *Schreiber v. Carey*, 48 Wis. 208, 219; *Chicago etc. Ry. Co. v. St. Clair*, 144 Ind. 371; *Merrill v. Elam*, 2 Tenn. Ch. 513, 515; *Fuller v. Taylor*, 6 N. J. Eq. 301; *Browning v. Bettis*, 8 Paige, 568; *Pittsburgh v. Everingham*, 6 Paige, 29; *Barker v. Dayton*, 28 Wis. 367; *Bank v. Schermerhorn*, Clarke Ch. 214; *Bank v. Spencer*, Clarke Ch. 386. In mortgage foreclosure cases a receiver may be allowed, in cases of urgent necessity, even after a decree and sale, for until after that time it is frequently the case that the necessity for the appropriation of the rents and profits to the payment of the mortgage debt does not appear. A receiver to collect them may, therefore, be afterward appointed by the court, upon a proper showing of facts and circumstances rendering such a course indispensably necessary for the mortgagee's protection, and equitable and just: *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Astor v. Turner*, 11 Paige, 436, 43 Am. Dec. 766; *Adair v. Wright*, 16 Iowa, 385; *Schreiber v. Carey*, 48 Wis. 208, 219. And the same is true after a decree for the sale of real estate to satisfy creditors having liens thereon: *Moran v. Johnston*, 26 Gratt. 108. A receiver may also be appointed, in a proper case, pending an appeal, but the court that rendered the decree appealed from is the proper court to hear and determine such an application: *Brinkman v. Ritzinger*, 82 Ind. 358, 364; *Beard v. Arbuckle*, 19 W.

Va. 145; Hutton v. Lockridge, 27 W. Va. 428, 433; Penn Mut. Life Ins. Co. v. Semple, 38 N. J. Eq. 314; Merrill v. Elam, 2 Tenn. Ch. 513; Mitchell v. Roland, 95 Iowa, 314. But, notwithstanding the provision of a statute which declares that a receiver may be appointed "in cases where a corporation has been dissolved, or is insolvent, or in danger of insolvency, or has forfeited its rights," a court which enters judgment of forfeiture against a corporation, at the suit of the state, for abuses of its franchises, has no authority to appoint a receiver of the corporate assets, unless at the instance of some person interested as a creditor or stockholder, and upon a showing that such appointment is necessary for the protection of its rights. An order appointing a receiver for such a corporation at the instance of the state is void: Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192.

The cases above cited in this subdivision show that a receiver may be appointed at any stage of a cause, upon a proper state of facts appearing, and that a prayer for the purpose in the bill is not an essential prerequisite: Merrill v. Elam, 2 Tenn. Ch. 513, 515. He may be appointed, though the time for other substantial relief has not arrived, as where a mortgage debt has not yet become, but the subject matter of the mortgage is becoming, impaired or wasted: Brassey v. New York etc. R. R. Co., 19 Fed. Rep. 663, 669; American etc. Trust Co. v. Toledo etc. Ry. Co., 20 Fed. Rep. 416; Brassey v. New York etc. R. R. Co., 22 Blatchf. 72, 80. If a receiver dies, another may be appointed: Nicoll v. Boyd, 90 N. Y. 516. After the plaintiff's application for a receiver has been dismissed, the defendant cannot procure the appointment of a receiver in the action: Dale v. Kent, 58 Ind. 584.

Over What Property, Generally.—In proper cases, a court of equity may appoint a receiver over property, whether corporeal or incorporeal. The jurisdiction to appoint a receiver is exercised in cases of personal property as well as real property: See note to Cortleyeu v. Hathaway, 64 Am. Dec. 484. Thus, receivers have been appointed to take charge of the emoluments of an office: Cheek v. Tilley, 31 Ind. 126; contra, Stone v. Wetmore, 42 Ga. 601; Tappan v. Gray, 9 Paige, 507; affirmed in Tappan v. Gray, 7 Hill, 259; of tolls of various kinds: Covington Drawbridge Co. v. Shepherd, 21 How. 112, 125; State v. Northern Cent. Ry. Co., 18 Md. 193; of debts to be collected by legal proceedings: Mills v. Pittman, 1 Paige, 490; though a receiver for open accounts, small as to the property to be sequestered, is not proper: Virginia etc. Iron Co. v. Wilder, 88 Va. 942; nor where the parties have agreed upon a method of collection: Simon v. Schloss, 48 Mich. 233; of a secret code of information: Simmons Hardware Co. v. Walbel, 1 S. Dak. 488, 36 Am. St. Rep. 755; of a seat or membership in a stock board or produce exchange: Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63. A court of equity has jurisdiction to appoint, by way of equitable execution, a receiver for an equitable reversionary interest in personal estate: Tyrrell v. Painton (1895), 1 Q. B. 202; but a receiver for patents, as equitable

assets, to be disposed of for the satisfying of a decree, is not authorized: *Thayer v. Hart*, 24 Fed. Rep. 558; and it is unnecessary and improper to appoint a receiver for property, which consists of a decree of court, and of which a receiver cannot take possession: *Scruggs v. Memphis etc. R. R. Co.*, 108 U. S. 368, 378.

It is proper to appoint a receiver for a fund in peril, where it is in litigation, unless it is in the custody and care of the person entitled to it, in which case he will generally be allowed to retain it, and a receiver will be denied: *Parkhurst v. Kinsman*, 2 Blatchf. 78, 82; *Rheinstein v. Bixby*, 92 N. C. 307; *Levenson v. Elson*, 88 N. C. 182, 184. A receiver for funds in the hands of a special commissioner is proper to prevent the doing of an act whereby rights in controversy may be endangered: *Northern Pac. R. R. Co. v. St. Paul Ry. Co.*, 47 Fed. Rep. 586; affirmed in *St. Paul etc. Ry. Co. v. Northern Pac. R. R. Co.*, 49 Fed. Rep. 806; and a receiver is proper to prevent the removal or disposition of moneys and securities until the right thereto is decided: *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197; see *Domestic Sewing Machine Co. v. Johnson*, 83 Ga. 426. A receiver, in a proper case, may be appointed to take charge of wild animals intended for exhibition by a zoological company in its arena: *Hagenbeck v. Hagenbeck etc. Arena Co.*, 59 Fed. Rep. 14; of abstracts of title, in the possession of a law firm, where suit has been brought for its dissolution: *Brush v. Jay*, 113 N. Y. 482; of personal chattels, in an action to enforce specific performance of a parol agreement to execute a bill of sale of the property: *Taylor v. Eckersley*, 2 Ch. Div. 302; of rings and jewelry: *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 686; of vessels, to enforce the foreclosure of maritime liens, under the statutes of the state of Washington: *Washington Iron Works Co. v. Jensen*, 3 Wash. 584; of other property covered by liens: *McCullough v. Jones*, 91 Ala. 186; of the assets of insolvent traders, under the statute of Georgia: *Allen v. Nussbaum*, 87 Ga. 470; of property transferred by a failing debtor to an insolvent trustee: *Haggarty v. Pittman*, 1 Paige, 298, 19 Am. Dec. 434; and of property in suit to which the claims of the parties are equally just, and the question is, Who is entitled to prior satisfaction in the event that the property is not sufficient to pay both parties? *Hamberlain v. Marble*, 24 Miss. 586, 587.

A receiver is proper in cases of conflicting claims to land, to prevent waste and the expenses and troubles of threatened and reasonably expected litigation, arising from frequent conflicts over the possession pending a suit wherein the title is the subject of litigation: *Hlawacek v. Bohman*, 51 Wis. 92, 95. A receiver may be appointed in an action of trespass for the taking of a quantity of logs from public lands: *Steele v. Walker*, 115 Ala. 485, 67 Am. St. Rep. 62. The fact that liens greatly exceed the value of the property sometimes justifies a receiver: *Shannon v. Hanks*, 88 Va. 338, 340; and a receiver for hotel property is authorized where it would materially depreciate in value if the hotel were closed: *Lowell v. Doe*, 44 Minn. 144. But a receiver for a building of the patrons of hus-

bandry will not be appointed where the plaintiff's case lacks equity: *Hinkley v. Blethen*, 78 Me. 221, 223. So, where lands are exchanged and a foreclosure suit is brought: *Garrard v. Amoss*, 83 Ga. 763. Neither is a plaintiff, without any equity, entitled to have a receiver appointed for the purpose of preserving a jail and jailer's residence, though it is alleged that the property is rapidly going to ruin and decay. The right to the possession of county property is in the board of supervisors: *Manly Mfg. Co. v. Broadbush*, 94 Va. 547, 555. A receiver may be appointed for growing crops, in a case where the facts justify it: *Corcoran v. Doll*, 35 Cal. 476, 480; otherwise the order of appointment will be rescinded on appeal: *Williams v. Green*, 37 Ga. 37, 47. In case of escheated estates, receivers may be appointed to collect rents of the tenants, where there is danger of their loss by delay: *People v. Norton*, 1 Paige, 17, 18; and a receiver may be appointed to take charge of a bankrupt's estate: *McLean v. Lafayette Bank*, 8 McLean, 503. It is hardly necessary to pursue this enumeration of the property over which a receiver may be appointed any further. He is appointed upon a principle of justice for the benefit of all concerned; and "every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession": *Davis v. Gray*, 16 Wall. 203, 217, per Swayne, J. And the form of the action is not material wherever justice requires such appointment: *Hellebush v. Blake*, 119 Ind. 349.

A court may appoint a receiver of personal property within its jurisdiction, and involved in a pending action, although the defendant may reside in another state: *Hellebush v. Blake*, 119 Ind. 349. It is proper to appoint a receiver over property which one willfully allows to depreciate, or of which he wrongfully disposes, where the applicant for the receivership has an interest in the property: *Jones v. Quayle*, Idaho, May, 1898; or over the property of an insolvent contractor: *McElwaine v. Hosey*, 135 Ind. 481; but a receivership, at the instance of contractors, is not proper where the property, such as that of a suspended cable-car company, is in no danger, and where the only good a receiver could do would be to paint the cable and lock up the machinery: *Houchin v. Turner*, 89 Ga. 26, 28. A receiver is not authorized as to any other property than that in which the plaintiff has an interest. He cannot be appointed to take charge of property which is not the subject of litigation: *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209; *Wormser v. Merchants' Nat. Bank*, 49 Ark. 117. And a receivership must be of the whole estate: *Fairbairn v. Fisher*, 4 Jones Eq. 890. A receiver will not generally be appointed to take charge of property which is not in possession of a party to the suit: *Searles v. Jacksonville etc. R. R. Co.*, 2 Woods, 621; *Mays v. Wherry*, 3 Tenn. Ch. 84; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565, 567; but in the case of an agent or a consignee having goods in his hands, a receiver has been appointed in a proceeding against the principal, the agent not being made a party to the suit: *Ex parte Cohen*, 5 Cal. 494; *Micklethwaite v. Rhodes*,

4 Sand. Ch. 434. A receiver will be refused where the party in possession claims under the party who moves for the appointment. The court can only appoint a receiver of property when the person in possession is before the court: *Mays v. Wherry*, 8 Tenn. Ch. 34. But, in any case where it is found necessary to protect the rights of all parties, and to properly execute the decree, the court has inherent power to appoint a receiver: *McElwaine v. Hosey*, 135 Ind. 481.

Statutes.—Where a statute purports to define the cases in which receivers may be appointed, and is not prohibitory or exclusive, it must be construed as merely permissive and declaratory. If the statute is applicable, and furnishes an adequate remedy, the power of the court to appoint is limited by the statute, and it must proceed in the manner therein pointed out, or else its orders will be void. But a court of chancery has inherent power, as in mortgage cases, to appoint receivers. The exercise of such a power, in foreclosure suits, is a part of its incidental jurisdiction, not depending upon any statute: *Hollenbeck v. Donnell*, 94 N. Y. 342, 345; *United States Trust Co. v. New York etc. Ry. Co.*, 101 N. Y. 478; *Colwell v. Garfield Nat. Bank*, 119 N. Y. 408, 418. Compare *Fellows v. Heermans*, 13 Abb. Pr., N. S., 1, 7. The code of North Carolina, specifying the cases in which receivers may be appointed, does not materially alter the equitable jurisdiction of the courts upon the subject: *Skinner v. Maxwell*, 68 N. C. 45, 48. But the tendency of statutes, generally, seems to be to displace restrictions upon the right to have receivers appointed and to make the equitable remedy more efficacious. Thus, the English and Canadian judicature acts have greatly enlarged the cases in which receivers may be appointed by authorizing them to be appointed in all cases in which it shall appear to the court that it is "just" or "convenient" that such order shall be made: *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275, 286; *Smith v. Port Dover etc. Ry. Co.*, 12 Ont. App. 288. And the statute of Indiana provides that receivers may be appointed, where, in the discretion of the court, it may be necessary to secure "ample justice" to the parties: *Hellebush v. Blake*, 119 Ind. 349, 351. The statutes of some other states probably have like provisions, and the liberality exercised by courts in appointing receivers must, in a great measure, be attributed to such statutory authority, which gives the judge a large discretion—a discretion, of course, to be judicially exercised—but, nevertheless, one which is exceedingly elastic, though the court is bound to act according to well-established principles: *Foxwell v. Van Grutten*, [1897], 1 Ch. 64, 68; *Smith v. Port Dover etc. Ry. Co.*, 12 Ont. App. 288. The fact that a receiver "may" be appointed, when it is "just" or "convenient," does not take away the discretion of the court to refuse a receiver, when the facts justify such a refusal: *In re Prytherch*, 42 Ch. Div. 590, 600.

Assignment for Benefit of Creditors.—The appointment of a receiver to take charge of property which has been assigned for the benefit of creditors is a "harsh" remedy, and one to which resort should not be had, except where the interests of creditors are exposed to mani-

fest peril. If there is no allegation and proof of any misfeasance of the assignee, or of any misappropriation by him of any part of the trust property, a receiver should be denied: *Dozier v. Logan*, 101 Ga. 173. But a receiver is proper, in such cases, at the instance of creditors, where the assignee is insolvent, and an action is pending, particularly where their honest claims are jeopardized by the assignment to an irresponsible trustee: *Haggarty v. Pittman*, 1 Paige, 298, 19 Am. Dec. 434; *City Nat. Bank v. Bridgers*, 114 N. C. 381. So, if the assignee becomes insolvent, the assignor may apply for a receiver to execute the trust declared in the assignment: *Keyes v. Brush*, 2 Paige, 311. And a receiver is proper where there has been a fraudulent assignment of a debtor's property for the benefit of creditors: *Ellett v. Newman*, 92 N. C. 519; *Powers v. Hamilton Paper Co.*, 60 Wis. 23; contra, *Bank of America, Petitioner*, 13 B. I. 176. A receiver is proper, where the trustee has failed to give the bond required, to take charge of the assigned estate pending the action: *Bank v. Bridgers*, 114 N. C. 381; or does not do anything toward carrying the objects of the trust into execution: *Suydam v. Dequindre*, Harr. Ch. 346, 351.

A receiver may be appointed, notwithstanding an assignment for the benefit of creditors, when a proper case therefor is made, under the statute, for such appointment: *Journey v. Brown*, 26 N. J. L. 111; *Powers v. Hamilton Paper Co.*, 60 Wis. 23. Thus, under the statute of Wisconsin, a complaint against an insolvent corporation, for the appointment of a receiver, et cetera, states a cause of action where, in addition to the necessary averments, it alleges a previous voluntary assignment of all the property of the corporation for the benefit of creditors, and that such assignment was made with intent to hinder, delay, and defraud the plaintiff and other creditors, and that among the debts preferred were individual debts of the directors of the corporation: *Powers v. Hamilton Paper Co.*, 60 Wis. 23. Under the statute of Minnesota, a receiver may be appointed to take charge of an insolvent, nonresident debtor's property in that state, which has been attached, although, in the proceedings for such appointment, it appears that, before the property in Minnesota was attached, the debtor had made an assignment for the benefit of creditors in the state of his domicile: *Rollins v. Rice*, 60 Minn. 358. Under the statute of Minnesota, it is discretionary with the court to appoint a receiver or not; yet, if before the formal determination of any issue upon the plaintiff's allegations, essential to sustain the action, it is admitted that the facts which give the right of action exist, and there is no defense, it is an abuse of discretion to refuse to appoint a receiver. The court has no discretion to grant or refuse the remedy given by the statute, and, when a creditor has commenced his action, under that statute, against a corporation, no subsequent act on the part of the corporation, by making an assignment for the benefit of creditors, or of any other creditor of the corporation, by procuring the appointment of a receiver under the insolvent law, or

otherwise, can defeat or impair his remedy by such action: *State v. Bank*, 55 Minn. 139, 144.

A receiver for property assigned for the benefit of creditors is properly denied where the assignee is a suitable and competent person to execute the trust, where no valid objection to him is urged, and where no legal prejudice can result to creditors: *Hyde v. Weitner*, 45 Minn. 35. The youth and inexperience of an assignee for the benefit of creditors, and the fact that he is not required to give a bond, though his property is inconsiderable when compared with the value of the property conveyed by the assignment, are not sufficient to justify his removal, at the instance of creditors, and the appointment of a receiver in his stead, if no jeopardy to the interests of creditors appears: *Jones v. McPhillips*, 77 Ala. 314. A court of equity has no authority, in the absence of the established grounds for equitable interference, upon the application of a preferred creditor, though with the consent of the assignor and assignee, to place property, which has been assigned for the benefit of creditors, into the hands of a receiver to be sold, on the ground that it will be a benefit to the estate: *Penzel Grocer Co. v. Williams*, 53 Ark. 81.

Attached Property.—Under the code of Washington, the superior court is authorized to appoint a receiver over attached property, who shall have power to manage, control, and sell it, when it is of such a character that its value would be diminished by mere lapse of time, although there is an assignment for the benefit of creditors pending in the court: *State v. Superior Court*, 14 Wash. 324. So, a court may appoint a receiver to take charge of goods where the garnishee abandons the property, or where he declines to retain the same in his hands: *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635, 8 Am. St. Rep. 224. But when an attachment at law has been levied on personal property, a court of equity will not appoint a receiver in aid of the suit, unless special circumstances are shown which render the attachment inadequate and inefficacious: *Pearce v. Jennings*, 94 Ala. 524; *Williams v. Dismukes*, 106 Ala. 402. A court is not authorized to appoint a receiver of the assets of an insolvent debtor, and to require an attachment creditor to surrender property held by virtue of his writ: *Lawton v. Richardson*, 115 Mich. 12. And it is an excessive act of authority, unwarranted under well-established practice and usage, for a federal court to appoint a receiver for property which has been attached and is within the control of a state court: *Southern etc. Trust Co. v. Folsom*, 75 Fed. Rep. 929. Compare the subdivision, "Fraud," *infra*.

Banks.—A court of equity is authorized, under the statute of Iowa, to appoint a receiver of a state bank, upon the petition of a stockholder, whenever it is shown that he is a party to a court proceeding, and has a probable right or interest which is endangered; and this, notwithstanding the fact that other statutes enable the auditor of state to have receivers appointed for insolvent banks, and provide for ousting corporations. The jurisdiction to appoint, in such a

case, is conferred by averments that the assets of the bank are scattered, that it is doing a losing business, that a "run" is threatened, and that the bank cannot maintain its credit: *Dickerson v. Cass County Bank*, 85 Iowa, 392, 397. But the right to appoint a receiver for an insolvent bank, such as a national bank, should be exercised only to prevent "the defeat of justice." A receiver should not be appointed because of an unavoidable transaction, in no sense fraudulent, and where the bank is not shown to be insolvent: *Roberts v. Washington Nat. Bank*, 9 Wash. 12. A circuit court of Missouri can, as a court of equity, and independently of the statute, appoint a receiver for an insolvent savings bank, and confirm the appointment in term: *Greeley v. Provident Sav. Bank*, 103 Mo. 212, 222. In the *French Bank* case, 53 Cal. 495, which was that of a savings bank, the court denied its jurisdiction to appoint a receiver, either under the statute or at common law, upon the application of a creditor and depositor: See comments upon this case in the extended note to *Matter of Franklin Bank*, 19 Am. Dec. 430. The legislature has power to appoint a receiver for an insolvent bank. It is not a judicial act: *Carey v. Giles*, 9 Ga. 253, 256.

The appointment of a receiver for a liquidating bank rests largely within the discretion of the court, and will not be made, upon the application of a stockholder, until the danger of loss or injury to the rights of the plaintiff is clearly shown, and the right to, and necessity for, the appointment is free from reasonable doubt: *Watkins v. National Bank*, 51 Kan. 254. It must be shown that there is a reasonable probability that the complainant asking the appointment will ultimately succeed in obtaining the relief sought by his suit: *Bank of Florence v. United States Sav. & Loan Co.*, 104 Ala. 297. To justify the appointment of a receiver for a bank without notice, there must be shown a strong case of pressing emergency, rendering immediate interference necessary before there is time to give notice, or it must be shown that notice would jeopardize the delivery of the property over which the receivership is to be extended: *Bank of Florence v. United States Sav. & Loan Co.*, 104 Ala. 297. An insolvent bank cannot, any more than any other debtor, have a receiver appointed over its own property: Note to *Matter of Franklin Bank*, 19 Am. Dec. 429; *Hugh v. McRae*, Chase's Dec. 466; *Kimball v. Goodburn*, 32 Mich. 10; particularly upon an ex parte application: *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009. Under the California bank commissioners' act, which authorizes the attorney general, upon the request of the board of bank commissioners, to commence suit to enjoin any bank, which is conducting its business in an unsafe manner, or is violating its charter, from transacting further business, and to cause its affairs to be wound up under the direction of the commissioners, the court is not authorized to appoint a receiver of the property of the bank, in such proceedings, though the bank commissioners and the creditors of the bank consent, and though there are provisions in the Code of Civil Procedure authorizing the appointment of receivers in other proceedings: *Murray v. American*

Surety Co., 70 Fed. Rep. 341; affirming the same case, 59 Fed. Rep. 245, and 61 Fed. Rep. 273.

Bankruptcy.—The making of a general assignment for the benefit of creditors is one of the acts of bankruptcy prescribed by the national bankrupt act of July 1, 1898, and, if proceedings in bankruptcy are instituted against a corporation, on the ground that it has made such an assignment, and the answer admits that the company is insolvent and that the assignment was made, and avers that the assignee is in possession of the estate and that he is proceeding to administer it in accordance with the insolvency law of the state, under the direction of the state court, the court of bankruptcy has power to appoint a receiver to take charge of the estate pending the adjudication in bankruptcy. In other words, a receiver may be appointed before the company has been declared to be a bankrupt. In this connection it may be observed that the national bankruptcy law suspends the operation of state insolvency laws: *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329. See subdivision. "Insolvency," *infra*.

Benefit Societies.—In a suit against an insolvent benefit society, a receiver may be appointed at the instance of a shareholder of the corporation, as well as a creditor thereof, or of a shareholder who has rights as a policy-holder or creditor, to wrest the management and property of the corporation from the hands of designing, incompetent, and irresponsible officers in charge of its affairs, who are squandering or converting the funds: *Supreme Order of Iron Hall v. Baker*, 134 Ind. 293, 313, 315; especially where all proper efforts to obtain relief in the order have been made and have failed: *Fogg v. Supreme Lodge of Golden Lion*, 156 Mass. 431; but where every substantial averment of the bill is denied by a completely responsive answer, which is not overcome or met by further proof, there is no basis for a receivership: *Crombie v. Order of Solon*, 157 Pa. St. 588. A receiver will not be appointed to take charge of a beneficial corporation, and to administer its assets, where it is not alleged to be insolvent. The granting of the relief would necessarily result in the dissolution of the corporation, and the forfeiture of its charter, and this a court of equity has not the power to declare and enforce: *Mason v. Supreme Court etc.*, 77 Md. 433, 39 Am. St. Rep. 433.

Building and Loan Associations.—Courts of equity have jurisdiction in a pending suit to appoint receivers to administer the assets of insolvent building and loan associations: *Towle v. American Bldg. etc. Soc.*, 60 Fed. Rep. 131; *Hatfield v. Cummings*, 152 Ind. 280. Thus, if the officers of such an association have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in, a shareholder is entitled to have the corporate assets placed in the hands of a receiver: *Towle v. American Bldg. etc. Soc.*, 60 Fed. Rep. 131. So a receiver *pendente lite* should be appointed, where the directors, without consulting the shareholders, make an assignment for the benefit of creditors, and deliver the corporate assets to the assignees, but the shareholders repudiate the assignment and elect a new board of directors, who elect new officers, and where

the shareholders, upon the refusal of the old directors and officers to recognize their action, bring suit to set aside the assignment and to restore the assets to the corporation. Such circumstances present the "unusual spectacle of two sets of managing officers for the distressed corporation," and a court of equity will not restore the assets to the custody of either: *Powers v. Blue Grass etc. Loan Assn.*, 86 Fed. Rep. 705. If a loan association persists in illegal practices, and becomes insolvent, it is proper to appoint a receiver for it: *Illinois Bldg. Assn. v. People*, 173 Ill. 638.

A receiver is not proper, however, where illegal and unsafe practices of the association have been corrected, after notice from a state officer, and the assets have been "made sufficient": *Continental etc. Soc. v. People*, 167 Ill. 195. Nor where the facts alleged do not present a proper case for a receivership: *New South etc. Loan Assn. v. Willingham*, 93 Ga. 218. A receiver for a building and loan association will not be appointed, if the effect of the appointment is to wreck the corporation. A court of equity will not destroy the interests of many shareholders to protect the interests of a few, when it is not necessary to do so: *Steinberger v. Independent Loan etc. Assn.*, 84 Md. 625, 636. Neither will it appoint a receiver of a building association where there are no assets to be distributed: *Barton v. Enterprise etc. Bldg. Assn.*, 114 Ind. 226, 5 Am. St. Rep. 608.

Conflict of Laws—Foreign Receiver.—If the parties to an action reside in one state, a court of that state has power to appoint a receiver to take possession of the property of the defendant in another state, but such court has no power to remove, or cause to be removed, personal property from another state, so as to bring it within the jurisdiction of the state in which the court sits which has appointed the receiver. Thus, equity will not compel an insolvent defendant, in an action of detinue instituted in West Virginia to return to that state, nor will it appoint a receiver to bring back the property in dispute to answer the judgment in detinue, where the defendant had, before the commencement of the latter action, sold or pledged such property in good faith, to a resident of another state, and placed him in possession thereof, which he has since retained, though such property was forwarded to him to prevent its recovery in an action of detinue which might be brought in West Virginia, where the parties resided: *Straughan v. Hallwood*, 30 W. Va. 274, 8 Am. St. Rep. 29.

Corporations.—No one can demand the appointment of a receiver for a corporation, *ex debito justitiæ*, unless there is a statute giving the right to a receiver upon the facts presented. The question whether or not a receiver will be appointed in a given case concerning corporations is addressed, as in other cases, to the sound discretion of the chancellor, under all the circumstances: *Milwaukee etc. R. R. Co. v. Soutter*, 2 Wall. 510; *Rider v. Bagley*, 84 N. Y. 461, 464; *Verplank v. Caines*, 1 Johns. Ch. 57; *Lowell v. Doe*, 44 Minn. 144, 148; *Myers v. Estell*, 48 Miss. 372; *Sales v. Lusk*, 60 Wis. 490; *Morrison v. Buckner*, Hemp. 442; and the general principles controlling the appointment of receivers in other cases apply to the appointment of a

receiver for corporate property. Thus, a receiver will not be appointed by an *ex parte* order in a pending suit, except in cases of necessity, as where service of notice cannot be had: *Mestier v. Chevalier Pavement Co.*, 51 La. Ann. 142; *Maish v. Bird*, 59 Iowa, 807. Nor will a receiver be appointed where the company is not a party to the bill: *Gravenstine's Appeal*, 49 Pa. St. 316; *Mickles v. Rochester City Bank*, 11 Paige, 118, 42 Am. Dec. 103; *Baker v. Backus*, 32 Ill. 79. If an *ex parte* application is relied on, the facts justifying the appointment under such circumstances should be set forth with particularity: *Fricker v. Peters*, 21 Fla. 254; *French v. Gifford*, 30 Iowa, 148; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Attorney General v. Bank of Columbia*, 1 Paige, 511; *Mulqueeney v. Shaw*, 50 La. Ann. 1060, 1063. In Indiana, a receiver for a corporation may be appointed, though it is the only remedy sought in the suit: *Supreme Order of Iron Hall v. Baker*, 134 Ind. 293, 305. Contra, *Davis v. Flagstaff etc. Min. Co.*, 2 Utah, 74, 94. The applicant for a receivership must be a party in interest. If a stranger, by fraud, procures himself to be appointed a receiver of moneys coming into the custody of the court in the litigation, he will be treated as a trespasser: *O'Mahoney v. Belmont*, 62 N. Y. 133, 144. A receiver for a corporation will not be appointed where there are no assets to administer: *Barton v. Enterprise Bldg. Assn.*, 114 Ind. 226, 5 Am. St. Rep. 608; *Lister v. Log Cabin Bldg. Assn.*, 33 Md. 115, 122; *Young v. Rollins*, 85 N. C. 485; *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61. Nor will a receiver be appointed on the application of the corporation itself: *Kimball v. Goodburn*, 32 Mich. 10; *Hugh v. McRae*, Chase's Dec. 466; *McIlhenny etc. Trust Co. v. Binz*, 80 Tex. 1, 28 Am. St. Rep. 705. There must be a pending suit: *State v. Ross*, 122 Mo. 435, 450, 461. Compare *Wabash etc. Ry. Co. v. Central Trust Co.*, 22 Fed. Rep. 272; 23 Fed. Rep. 863, and comments thereon in *State v. Ross*, 122 Mo. 435, 460. See, also, *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747. A stockholder or shareholder is not always bound, in conformity with the general rule, to seek redress by an application to the directors or the corporation itself before applying to a court of equity for the appointment of a receiver, but may make such application, without any prior application to the corporate officers, where their own dishonesty, wrong, and fraud is the ground of the application: *Supreme Order of Iron Hall v. Baker*, 134 Ind. 293, 316. The fact that a receiver has already been appointed in a foreclosure suit against an insolvent corporation constitutes no reason why a receiver should not be appointed in a suit to sequester all its property for the benefit of all of its creditors: *St. Louis Car Co. v. Stillwater St. Ry. Co.*, 53 Minn. 120.

It is not against public policy to appoint a receiver over the property of corporations: *State v. Northern Cent. Ry. Co.*, 18 Md. 193, 216; and where there is fraud or spoliation, or imminent danger of the loss of the property, if the immediate possession thereof is not taken by the court, there will be no hesitation by the court in ap-

pointing receivers over the property of corporations, for the benefit of all concerned during the controversy: *Davis v. United States etc. Light Co.*, 77 Md. 35; *Steinberger v. Independent Sav. Assn.*, 84 Md. 625; *Boston Inv. Co. v. Pacific etc. Bridge Co.*, 104 Iowa, 311; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 645. Independently of statutory provisions, as we shall see, *infra*, equity has jurisdiction to appoint a receiver over corporate property in the following cases: 1. At the suit of those who have a lien upon the corporate property; 2. At the suit of creditors who have obtained judgment and have exhausted legal remedies to collect it; 3. At the suit of a creditor or stockholder of a moneyed corporation interested in its funds, where there is a breach of duty on the part of the directors, and a threatened loss of funds; 4. Where the corporation is dissolved and has no officer to attend to its affairs.

A receiver for the property of a corporation is proper where its directors have abdicated their functions: *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 48 Fed. Rep. 204; or where the owners of a majority of the corporate stock of a turnpike company neglect and refuse to make needed repairs in the roadway, thus rendering the property nonproductive: *Wayne Pike Co. v. Hammons*, 129 Ind. 368. The fact that a corporation has made an assignment for the benefit of creditors, either before the suit for a receiver, or while it is pending, does not affect the right to have a receiver appointed where the facts justify it: *Powers v. Hamilton Paper Co.*, 60 Wis. 23; *Suydam v. Dequindre, Harr.* (Mich.) 347; *Jones v. Dougherty*, 10 Ga. 273; *Belmont Nail Co. v. Columbia etc. Steel Co.*, 46 Fed. Rep. 8. The court may appoint a receiver for property assigned by the corporation for the benefit of certain creditors, although no fraud is shown in such assignment, if, in the opinion of the court, such action is necessary to secure "ample justice," as the Indiana statute puts it, to the parties: *Goshen Woolen Mills Co. v. City Nat. Bank*, 150 Ind. 279. In an action to enforce payment of the statutory liability of stockholders in an Ohio corporation, a receiver may be appointed by the court, to collect and distribute the fund: *Zieverink v. Kemper*, 50 Ohio St. 208. A domestic receiver may be appointed in the state where a corporation is organized, though all its property is in another state: *Bayne v. Brewer Pottery Co.*, 82 Fed. Rep. 391.

In the absence of statutory authority, a receiver cannot be appointed during the pendency of an action to displace the management of the corporation by its directors, unless there is fraud on the part of the officers, and then only in a very strong, clear case: *Fischer v. Superior Court*, 110 Cal. 129; *Supreme Order of Iron Hall v. Baker*, 184 Ind. 293, 316; *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61; *State v. Ross*, 122 Mo. 435, 461. A receiver cannot be appointed at the instance of a judgment creditor of a theater company to receive, by way of equitable execution, the moneys paid by the public for entrance to the theater: *Cadogan v. Lyric Theater*, [1894] 3 Ch. 338; nor can creditors of a private corporation invoke the powers of a court of equity to remove a trustee to whom the corporation has

conveyed all its assets for the benefit of creditors, with full power to manage its affairs and continue or cease business, as may be to their best interest, and to have a receiver appointed in his stead, for the purpose of indefinitely continuing the business until the creditors are paid out of the income: *Etowah Min. Co. v. Wills Valley etc. Mfg. Co.*, 106 Ala. 492, 497. A receiver will not be appointed to take charge of corporation notes, transferred as collateral security: *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61; nor to prevent a possible breach of contract, with a resulting liability against the corporation as a guarantor. Neither the conveyance of its assets to third persons, nor the misappropriation of its funds by its stockholders, affords any ground for equitable interference, in such a case, at the suit of the guarantee, when it does not appear either that the principal is insolvent, or that there has been any breach, by him, of the contract which was guaranteed: *Guilmartin v. Middle Georgia etc. Ry. Co.*, 101 Ga. 565. On a bill filed by one stockholder of a company against a director thereof, to take charge of moneys alleged to have been improperly received and retained by the director, a receiver will not be appointed where there is no apprehension of loss alleged, and it appears from the answer that the money was loaned to the director by the board of directors: *Hager v. Stevens*, 6 N. J. Eq. 374, 447. The appointment of a receiver for the purpose of winding up a "going" corporation is not authorized, unless it is expressly sanctioned by statute: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389.

In some of the states, the equitable powers of courts have been enlarged by statutes conferring express jurisdiction to appoint receivers over incorporated companies: *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Parsons v. Monroe Mfg. Co.*, 4 N. J. Eq. 187; *Brundred v. Paterson Machine Co.*, 4 N. J. Eq. 204; *Hager v. Stevens*, 6 N. J. Eq. 374; *Corrigan v. Trenton etc. Falls Co.*, 7 N. J. Eq. 489; *Kelly v. Neshanic Min. Co.*, 7 N. J. Eq. 579; *American Ice etc. Co. v. Paterson etc. Machine Co.*, 22 N. J. Eq. 72; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126; *Receivers v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Attorney-General v. Bank of Columbia*, 1 Paige, 511; *Ward v. Sea Ins. Co.*, 7 Paige, 294, 295; *People v. Security Life Ins. Co.*, 71 N. Y. 222; *United States Trust Co. v. New York etc. Ry. Co.*, 101 N. Y. 478; *Hewett v. Adams*, 54 Me. 206, 208; *Fay v. Erie etc. R. R. Bank*, Harr. Ch. 194; but they do not nullify the rule that the appointment of receivers is to be governed by the facts and circumstances of the case: *Parsons v. Monroe Mfg. Co.*, 4 N. J. Eq. 187. In the absence of statutory authority, a court of chancery has no general jurisdiction to appoint a receiver of a corporation and decree a forfeiture of its franchise and a sale of its property: *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 485; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 401, 403; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; but it is otherwise where it is authorized by the statute, particularly where creditors and lienholders consent: *Boston Inv. Co. v. Pacific etc. Bridge Co.*, 104 Iowa, 311. In Illinois, it is held that

courts of chancery have no general power to appoint receivers of corporations, and can only appoint them where expressly authorized by the statute: *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 485; *Davis v. Flagstaff etc. Min. Co.*, 2 Utah, 74; but the prevailing view, as elsewhere shown throughout this subdivision, is, that the jurisdiction to appoint receivers, as well as the power to order sales by them of the property and franchises of corporations, resides in courts of equity, independently of statutory provisions, and is conducted according to the principles of equity practice: *Fidelity etc. Trust Co. v. Schenley etc. Ry. Co.*, 189 Pa. St. 363, 69 Am. St. Rep. 815. A receiver may be appointed at the instance of one who brings himself within the provisions of a statute authorizing the appointment of receivers for corporations: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389. If there is a section of the code relating to the appointment of receivers, and another section providing for receivers of corporations, the latter controls all proceedings for the appointment of receivers of corporations; and such appointment cannot be justified, unless made under the circumstances specified in the section relating to corporations: *State v. Superior Court*, 15 Wash. 668, 55 Am. St. Rep. 907.

A receivership is not to be regarded as an ordinary incident of the proceedings to collect a debt: *Hollins v. Brierfield etc. Iron Co.*, 150 U. S. 371; *Parker v. Moore*, 3 Edw. Ch. 234. Hence, in order to justify the appointment of a receiver for a corporation on the application of a creditor, it should appear, at least, that he has a valid claim against the corporation, that there are assets applicable to its payment, and that he has exhausted his legal remedies, or that the circumstances are such that to deny the application would lead to a wasting and loss of property which otherwise might be made available for the payment of the debts of the corporation, and which could not be availed of in any other manner so satisfactorily as by the appointment of a receiver. When such a showing for a receiver is made, it is proper to appoint one; otherwise not: *Falmouth Nat. Bank v. Cape Cod etc. Canal Co.*, 166 Mass. 550, 568; *Parker v. Moore*, 3 Edw. Ch. 234; *Dodge v. Pyrolusite etc. Co.*, 69 Ga. 665; *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530; *Adler v. Milwaukee etc. Mfg. Co.*, 18 Wis. 57; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387; *Dobson v. Simonton*, 78 N. C. 63; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 401; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389; *Hinckley v. Pfister*, 33 Wis. 64; *Etowah Min. Co. v. Wills Valley etc. Mfg. Co.*, 106 Ala. 492, 497; *Varnum v. Hart*, 119 N. Y. 101; *Texas etc. Mfg. Assn. v. Storrow*, 92 Fed. Rep. 5. Simple unsecured contract creditors, whose claims have not been reduced to judgment, and who have no lien on the property of the corporation, are not entitled to have a receiver appointed: *Dodge v. Pyrolusite etc. Co.*, 69 Ga. 665; *Parmly v. Tenth Ward Bank*, 3 Edw. Ch. 395; *French Bank case*, 53 Cal. 495; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389; *Hinckley v. Pfister*, 33 Wis.

64; Texas etc. Mfg. Assn. v. Storrow, 92 Fed. Rep. 5; Guilmar-tin v. Middle Georgia etc. Ry. Co., 101 Ga. 563. Even after judgment, there must be some special circumstance to authorize equitable interference on behalf of a creditor seeking to collect his debt by hav-ing a receiver appointed: Dodge v. Pyrolusite etc. Co., 69 Ga. 665; and unwise and improper management of the affairs of a corpora-tion is not such a circumstance: Dodge v. Pyrolusite etc. Co., 69 Ga. 665. So a creditor who has presented his claim to a corporation and been refused payment is not entitled to a receiver: Miller etc. Co. v. Southern etc. Lumber Co., 53 S. C. 364. And if the entire stock of a corporation is owned by two members thereof, and the company is indebted to each, but the indebtedness has not been reduced to judg-ment or made a lien, and the corporation is solvent, neither of the members has a right, as a creditor, to the appointment of a receiver: Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 63 Am. St. Rep. 389. A creditor has no absolute right to a receiver, where an as-signee for the benefit of creditors is in charge of the corporate prop-erty: Walther v. Seven Corners Bank, 58 Minn. 434. Nor is a re-ceiver'ship proper, after a receiver has been appointed, at the in-stance of a creditor who begins another action for another receiver, where he had a right to make himself a party to the first suit: Na-tional Bank v. Richmond Factory, 91 Ga. 284. And a receiver, at the instance of a creditor, is not proper because other creditors are likely to precipitate suits against the corporation: Little Warrior Coal Co. v. Hooper, 105 Ala. 665. But a creditor may, of course, ob-tain a receiver under the circumstances prescribed by statute: Hurl-but v. Marshall, 62 Wis. 590; and the making of a general assign-ment of its property for the benefit of creditors, by an insolvent corporation, does not deprive the court of power to appoint a re-ceiver therefor at the instance of a corporation creditor: Oleson v. Bank of Tacoma, 15 Wash. 148. The appointment of a receiver is justified where bad faith and deceit have been exercised toward cer-tain creditors of a corporation: United States Rubber Co. v. Ameri-can Oak Leather Co., 82. Fed. Rep. 248. A receiver may be ap-pointed to collect unpaid stock subscriptions to pay the plaintiff's judgment: Bailey v. Pittsburgh etc. Co., 139 Pa. St. 213. A special receiver may be appointed to represent creditors, although the cor-poration is represented by a general receiver: Hale v. Hardon, 95 Fed. Rep. 747, 770. A receivership of an insolvent corporation should extend to all its property, where a receiver is appointed on a bill filed by a judgment creditor, under the New York Revised Stat-utes; but the corporation cannot complain of an order appointing a receiver of so much property only as is necessary to satisfy the com-plainant's debt, where it does not appear that there are any other debts: Morgan v. New York etc. R. R. Co., 10 Paige, 290, 40 Am. Dec. 241. If the security afforded by a bond or mortgage on cor-porate property is inadequate, and the mortgagor is unable to pay the deficiency, a court of equity may, where a foreclosure suit is pend-ing, appoint a receiver to collect the rents and profits of the mort-

gaged premises, if there are circumstances of fraud or bad faith on the part of the mortgagor, or other facts involved which would render a denial of the relief sought inequitable and unjust: *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Des Moines Gas Co. v. West*, 44 Iowa, 23; *Cheever v. Rutland etc. R. R. Co.*, 39 Vt. 653, 657. The failure of trustees to take possession of the mortgaged property, according to a provision made therefor in the mortgage, is sufficient ground for the appointment of a receiver: *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514.

In a proper case, a shareholder of a corporation may have a receiver appointed: *Supreme Order of Iron Hall v. Baker*, 134 Ind. 293; *Towle v. American Bldg. etc. Soc.*, 60 Fed. Rep. 131; *State v. Second etc. Dist. Ct.*, 15 Mont. 324, 48 Am. St. Rep. 682; as where the charter has been repealed, and it is sought to avert waste: *Putnam v. Ruch*, 54 Fed. Rep. 216; or where some of the creditors and stockholders are being favored to the injury of others: *Elwood v. First Nat. Bank*, 41 Kan. 475; or in a proceeding to annul an illegal traffic agreement between two railroad companies: *Earle v. Seattle etc. Ry. Co.*, 56 Fed. Rep. 909. So if it is shown, in case of the displacement of corporate officers, that they cannot be replaced through corporate agencies either by reason of the mere unwillingness or inability of the stockholders to do so, the court may appoint a receiver: *In re Belton*, 47 Ia. Ann. 1014. The appointment of a receiver for a corporation is not void merely because some of the stockholders are related to the judge making the appointment: *Ex parte Tinsley*, 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818. A receiver may be appointed to apportion a fund for which a judgment has been obtained by a stockholder, and pay over the moneys, collected on execution, to other stockholders equally interested: *Fox v. Hale etc. Min. Co.*, 108 Cal. 475. A stockholder, however, cannot interfere with the management, control, or business of a corporation by having a receiver appointed unless there is fraud, peril to property, or clear misconduct, which endangers the corporate property, and the corporation is insolvent: *Burnes v. Atchison*, 48 Kan. 507; *Watkins v. National Bank*, 51 Kan. 254; *Hill v. Gould*, 129 Mo. 106; *Crombie v. Order of Solon*, 157 Pa. St. 588; *Bell v. Wood*, 181 Pa. St. 175; *Hager v. Stevens*, 6 N. J. Eq. 374; *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 609. Thus, a receiver, at the instance of a stockholder, is not proper to control the corporate business until money is made to pay off debts. The corporation must run its own business: *People v. Weigley*, 155 Ill. 491, 505. A stockholder who is a creditor of a corporation has no right, on that ground, to have a receiver appointed, where it is solvent and able to meet its obligations: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389. A receiver of a corporation will not be appointed on the ground that it has two stockholders owning an equal number of shares of stock, and owns stock in another corporation, respecting the management of which there is such disagreement between the stockholders in the first-named corporation that they cannot agree in any measures for

the voting of such stock, or for the management of the second corporation, nor will a receiver be appointed of such stock alone: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389. A receiver should not be appointed at the instance of a stockholder, where he can protect himself by injunction, particularly if the officers of the corporation can attend to its business, and where a receivership would injure the business: *Empire Hotel Co. v. Main*, 98 Ga. 176; *United Electric etc. Co. v. Louisiana etc. Light Co.*, 63 Fed. Rep. 673, 675. A receivership, at the instance of a stockholder, should be refused where its only object is to hinder and delay the collection of claims of creditors of the corporation: *Bell v. Wood*, 181 Pa. St. 175; particularly where the bill is collusive: *Becker v. Hoke*, 80 Fed. Rep. 973; or where, there being no allegation of fraud, the president of a solvent company merely refuses to allow any inspection of the books by the complainant: *Ranger v. Champion Cotton-press Co.*, 52 Fed. Rep. 609. A mere allegation, in a bill by a stockholder for the appointment of a receiver, of the insolvency of a corporation, the recovery of certain judgments against it from which it desires to appeal, but which it will be unable to supersede because of its insolvency, and that its assets will be wasted if sold under such judgments, does not authorize the appointment of a receiver: *Becker v. Hoke*, 80 Fed. Rep. 973. A court of equity will not interfere in the internal policy and management and control of a corporation, with respect to the purchase of its own stock, unless it is manifest that it is about to exceed its corporate powers: *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646. It will not appoint a receiver to take the property of a corporation out of the hands of the managers elected by the stockholders, except as a last resort, and when it is absolutely necessary for the preservation of the trust fund: *United Electric etc. Co. v. Louisiana etc. Light Co.*, 68 Fed. Rep. 673. It will not appoint a receiver where the bill for that purpose declares no contest concerning property, no dispute of any kind between the parties, and no dereliction in duty by the corporation or its officers: *Becker v. Hoke*, 80 Fed. Rep. 973. Furthermore, a stockholder or shareholder is bound to seek redress by application to the directors, or the corporation itself, before applying to a court of equity for the appointment of a receiver, where that is feasible, and will afford to him an adequate remedy: *Roman v. Woolfolk*, 98 Ala. 219; *Supreme Order of Iron Hall v. Baker*, 134 Ind. 293, 316; *Bridgeport Development Co. v. Tritsch*, 110 Ala. 274; *Hawes v. Oakland*, 104 U. S. 450.

If insolvency is made a statutory ground for the appointment of a receiver, one may, of course, be appointed to protect creditors and stockholders, where the corporation is insolvent. Otherwise, insolvency alone does not justify the appointment of a receiver for it, as the insolvent law would generally afford a complete remedy. In addition to the fact of insolvency, it must further appear that the corporate property is in peril or danger of loss, or that it is being seriously impaired. This may be inferred from the fact of insolvency, or it may not, according to the circumstances. The appoint-

ment of a receiver does not necessarily follow upon proof of the company's insolvency, and should not be made unless it is also shown that loss will ensue to the parties in interest if the company continues in the management of its affairs. Furthermore, the insolvency must be actual. Contemplated future insolvency is not enough. And, even where the statute makes insolvency a ground for the appointment of a receiver for the property of a corporation, such insolvency is a jurisdictional fact and must be proved: *Atlantic Trust Co. v. Consolidated etc. Storage Co.*, 49 N. J. Eq. 402; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273; *Attorney-General v. Bank of Columbia*, 1 Paige, 511; *Lawrence Iron Works Co. v. Rockbridge Co.*, 47 Fed. Rep. 755; *Rothwell v. Robinson*, 44 Minn. 538; *Edison v. Edison etc. Phonograph Co.*, 52 N. J. Eq. 620; *Falmouth Nat. Bank v. Cape Cod etc. Canal Co.*, 166 Mass. 550, 569; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 43 Fed. Rep. 204; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192; *Buck v. Piedmont etc. Ins. Co.*, 4 Fed. Rep. 849; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126. The insolvency of a corporation is not enough to authorize the appointment of a receiver at the suit of its general creditors. It is only where the creditor has acquired some special or equitable lien that he is entitled to this remedy. The reason why the mere insolvency of the corporation is not enough to authorize the appointment of a receiver is in the fact that it may be to the best interest of the creditors that its business should continue, and its financial embarrassment will not necessarily prevent that result: *Doe v. Northwest etc. Transp. Co.*, 64 Fed. Rep. 928.

With respect to dissensions, dissatisfaction, and mismanagement, it may be said that if stockholders in a corporation disapprove of the company's management, which is conducted without fraud, or by action not ultra vires, or not in gross abuse of trust, or shall consider their speculation a bad one, their remedy is to elect new officers, or sell their shares and withdraw. The power of a court of equity to appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders seems to be settled law: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389; *Edison v. Edison etc. Phonograph Co.*, 52 N. J. Eq. 620, 625; but it is equally well settled that this power must always be exercised with great caution and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation and proceed in the discharge of its duties,

"the court must lift its hand and retire": *Edison v. Edison etc. Phonograph Co.*, 52 N. J. Eq. 620, 626; *Bridgeport Development Co. v. Tritsch*, 110 Ala. 274, 288; *Bank Commrs. v. Rhode Island Cent. Bank*, 5 R. I. 12; *Ogden v. Kip*, 6 Johns. Ch. 160. If it is not impossible, therefore, to carry on the corporate business with advantage to the parties interested, and there is no fraud or insolvency, mere differences of opinion and dissensions among the corporate officers, or dissatisfaction by a minority of the stockholders of the corporation with the conduct of its officers, or its management by the majority, does not justify the appointment of a receiver at the instance of the minority, or of a director, or of general creditors: *Fluker v. Emporia etc. Ry. Co.*, 48 Kan. 577; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 318, 63 Am. St. Rep. 389; *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665; *Sternberg v. Wolff*, 56 N. J. Eq. 555; *Ponca Mill Co. v. Mikesell*, 55 Neb. 98; *Pringle v. Eltringham Construction Co.*, 49 La. Ann. 301; *St. Louis etc. R. R. Co. v. Wear*, 135 Mo. 230, 258; *City Pottery Co. v. Yates*, 37 N. J. Eq. 543; *Einstein v. Rosenfeld*, 88 N. J. Eq. 309; *Dodge v. Pyrolusite etc. Co.*, 69 Ga. 665. Thus, a receiver to prevent a public sale of the assets of a corporation is not proper, in the absence of bad faith or waste: *Fort Payne etc. Co. v. Fort Payne etc. Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109; and it has been held that a receiver should not be appointed to take the management of a corporation from directors, who are majority stockholders, although they have derived some unfair advantage over other stockholders by a sale of corporate property to another corporation: *Hill v. Gould*, 129 Mo. 106. So extravagance, by employing large numbers of useless employes to further and promote political schemes of the governing body has been held no cause for a receiver: *Stewart v. Chesapeake etc. Canal Co.*, 5 Fed. Rep. 149, 151. And mere irregularities, such as want of economy and careless bookkeeping do not justify a receiver: *Hardee v. Sunset Oil Co.*, 56 Fed. Rep. 51. The court should not take the conduct of a business out of the hands of those who have been chosen by a majority in interest of the stockholders for that purpose, except upon clear proof that the business is jeopardized by their management, or of usurpation, ultra vires, fraud, or gross negligence. Hence, a court will not appoint a receiver for a solvent private corporation, at the instance of individual stockholders, merely on the ground that its officers and directors have changed its business from a large wholesale grocery business to a comparatively small specialty business, and have otherwise mismanaged its affairs, in the absence of such evidence: *Hunt v. American Grocery Co.*, 80 Fed. Rep. 70. On the other hand, where the directors or officers of a corporation are mismanaging the business in such a way as to actually jeopardize the rights of stockholders and creditors, as where the misconduct or mismanagement of the officers, or the dissensions between themselves, or between them and stockholders, imperil or injure the corporate property, a receiver should be appointed, sometimes by express provisions of the statute, although there was no actual fraud: *Supreme*

Order of Iron Hall v. Baker, 134 Ind. 293, 318; Stevens v. South Ogden Land Co., 14 Utah, 232; Goshen Woolen Mills Co. v. City Nat. Bank, 150 Ind. 279; State Journal Co. v. Commonwealth Co., 43 Kan. 93; Sincer v. Alverson, 51 Ia. Ann. 955; In re Lewis, 52 Kan. 660; St. Louis etc. Min. Co. v. Edwards, 103 Ill. 472. If, by reason of dissensions among the directors of a trading corporation, and their equal division and consequent inability to determine any question or adopt any resolution by a majority vote, it has become unable to carry on its business, such "deadlock" justifies the appointment of a receiver to take charge of and manage such business during the pendency of a suit concerning it: Sternberg v. Wolff, 56 N. J. Eq. 389, 97 Am. St. Rep. 494. If the mismanagement or misconduct of the directors, officers, or governing body of the corporation is willful, and runs into collusion and fraud, the right to a receiver, at the instance of general creditors or stockholders, is clear, where the property of the corporation is in danger of being lost to stockholders and creditors by such gross and outrageous misconduct, as where, among other acts, the officers and holders of a majority of the stock are fraudulently mismanaging the corporate business, converting its property to their individual use, and abusing their powers to the injury of other stockholders: Ponca Mill Co. v. Mikesell, 55 Neb. 98; Haywood v. Lincoln Lumber Co., 64 Wis. 639; Buck v. Piedmont etc. Ins. Co., 4 Fed. Rep. 849; State v. Second etc. Dist. Court, 15 Mont. 324, 48 Am. St. Rep. 682; Sincer v. Alverson, 51 Ia. Ann. 955; In re Lewis, 52 Kan. 660; Glover v. St. Louis etc. Inv. Co., 133 Mo. 408; United States Rubber Co. v. American etc. Leather Co., 82 Fed. Rep. 248; Supreme Order of Iron Hall v. Baker, 134 Ind. 293, 313; Hawes v. Oakland, 104 U. S. 450, and principal case. Contra, Edwards v. Bay State Gas Co., 91 Fed. Rep. 942, holding that a corporation itself should not be deprived of the possession of its assets, and its management and control be handed over to a receiver at the suit of some of its stockholders, because the officers and directors of the corporation have been guilty of participation in a wrongful abstraction of its property: Edwards v. Bay State Gas Co., 91 Fed. Rep. 942. It is also held in Laurel Springs Land Co. v. Fougerey, 50 N. J. Eq. 756, that, if the frauds of directors of a corporation are capable of complete redress without the appointment of a receiver, it is not proper to appoint one. For past frauds there is another remedy, and the purpose of a court of equity in appointing a receiver in such cases is to stop present fraud and prevent future fraud, to the end that the property may be preserved, as where all the officers and directors of a corporation have conspired together to divert its business to another company, dissipate its funds and fraudulently absorb and apply its assets to the individual benefit of such officers; or where the creditors and president of the corporation are fraudulently contriving to absorb all its property: Stevens v. South Ogden Land Co., 14 Utah, 232; In re Lewis, 52 Kan. 660; Aiken v. Colorado River Irr. Co., 72 Fed. Rep. 591; Doe v. Northwest etc. Transp. Co., 64 Fed. Rep. 928; McLaughlin v. National Inv.

Co., 64 Fed. Rep. 908. It is not every charge of fraud, however, against the directors and officers of a corporation that will stand. The allegations of fraud must be specific. The facts must be stated so that the court may see whether fraud has been committed; and where the charge of fraud is not sustained, the appointment of a receiver, upon that ground, is unauthorized: *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Mulqueeney v. Shaw*, 50 La. Ann. 1060, 1063; *Hill v. Gould*, 129 Mo. 106; *Fort Payne etc. Co. v. Fort Payne etc. Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109; *Hardee v. Sunset Oil Co.*, 56 Fed. Rep. 51; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508. Furthermore, a court of equity will not make itself an instrument, by the appointment of a receiver, to distribute ill-gotten gains, spoils, and accumulations on the tardy application of a stockholder, who was cognizant, from the beginning, of the fraudulent arrangement and proceedings which produced such accumulation of corporate assets: *Hager v. Stevens*, 6 N. J. Eq. 374, 446. Neither will it appoint a receiver at the instance of a general creditor of a corporation upon the ground that the rights of stockholders have been fraudulently infringed by the action of corporate officers, where they, being beyond the jurisdiction, cannot be brought to account, nor be compelled to restore ill-gotten gains, and where the appointment of a receiver, for the protection of the complainant's interests, is the main purpose of the suit: *Leary v. Columbia River etc. Nav. Co.*, 82 Fed. Rep. 775.

A corporation cannot be dissolved by a court of equity, unless the power to declare such dissolution has been conferred by statute: *Mason v. Supreme Court etc.*, 77 Md. 483, 39 Am. St. Rep. 433; and a statute authorizing the appointment of receivers for corporations does not authorize their dissolution by a court of equity, nor the placing of their property in the hands of receivers for the purpose of dissolution: *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 68 Am. St. Rep. 389; and it is not proper to appoint a receiver for a corporation, if the effect of such appointment is to dissolve the corporation, and to cause the forfeiture of its charter, although fraud mismanagement, and collusion on the part of the corporate authorities is alleged: *Mason v. Supreme Court etc.*, 77 Md. 483, 39 Am. St. Rep. 433; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508. A court of equity should not, in the absence of statutory authority, appoint a receiver, at the instance of a stockholder, for the purpose of dissolving a corporation, unless it is insolvent, or its affairs are being fraudulently mismanaged: *Texas etc. Mfg. Assn. v. Storrow*, 92 Fed. Rep. 5. The dissolution of a corporation at the suit of the state, or otherwise, does not necessarily justify the appointment of a receiver, but, after a forfeiture of corporate franchises or a judgment of dissolution, such appointment is justified to preserve the corporate property from waste, loss, or destruction, particularly in case of insolvency: *Baltimore etc. R. R. Co.*, 72 Md. 493, 499; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192; *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407; *State v. Cannon River etc. Assn.*, 67 Minn. 14; *State v. Superior Court*, 15

Wash. 668, 55 Am. St. Rep. 907; Stark v. Burke, 5 La. Ann. 740; In re Louisiana Sav. Bank, 35 La. Ann. 196; Dobson v. Simonton, 78 N. C. 63, 66; Lawrence v. Greenwich Fire Ins. Co., 1 Paige, 587; People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684; Parsons v. Charter Oak Life Ins. Co., 31 Fed. Rep. 305; Olmstead v. Distilling etc. Co., 78 Fed. Rep. 44; Security etc. Trust Co. v. Piper, Idaho, April, 1896. For further illustrations concerning the appointment of receivers for the property of corporations, see the extended note to Cortleyeu v. Hathaway, 64 Am. Dec. 485, and the subdivisions "Foreign Corporations," and "Fraud," *infra*.

Cotenancy—Joint Owners.—Courts will not grant a receiver against a tenant in common except in cases of destructive waste or gross exclusion; and the application will be denied except in extreme cases: Note to Cortleyeu v. Hathaway, 64 Am. Dec. 490. A receiver against a tenant in common is not properly granted, except in cases where it is necessary to protect the rights of the complaining party. The courts are averse to the appointment of receivers in actions between tenants in common, and will deny it where there is nothing to show that the defendants are in the exclusive possession of the rents and profits, excluding their cotenants from all participation therein, or that the defendants are insolvent, or that they are mismanaging the common property in such a way as to imperil it, or to cause its loss. But when such a showing is made a receiver may properly be appointed: Vaughan v. Vincent, 88 N. C. 116, 119; Cassetty v. Capps, 3 Tenn. Ch. 524; Williams v. Jenkins, 11 Ga. 595, 599; Blood v. Blood, 110 Mass. 545. A receiver will not be appointed, however, when the appointment will subject the cotenant to inconvenience and expense, without corresponding benefit to the complainant, and such cotenant gives the complainant security for the rents and profits: Low v. Holmes, 17 N. J. Eq. 148. See "Mines" and "Partition," *infra*.

Mere dissensions and ill-will between joint owners do not justify the appointment of a receiver: Wallace v. Pierce-Wallace Pub. Co., 101 Iowa, 313, 68 Am. St. Rep. 389; unless such fact prevents a beneficial use of the property, or practically operates as an exclusion of one of the joint owners from the benefit and use of the property: Lamaster v. Elliott, 53 Neb. 424, 429. But when one joint owner is disposing of the property in which the complainant claims an equal interest with him, is collecting and appropriating the proceeds of the sale, and is shown to be insolvent, the appointment of a receiver is authorized: Sims v. Adams, 78 Ala. 395.

Creditors' Suits.—A creditor at large, without a judgment or lien, is not entitled, as a general rule, to have a receiver appointed. In the absence of contrary statutory provision, a general contract creditor cannot, before judgment, where there is no showing of fraud or insolvency, have a receiver appointed against his debtor on whose property he has acquired no lien: Johnson v. Farnum, 56 Ga. 145; Pelzer v. Hughes, 27 S. C. 408; Uhl v. Dillon, 10 Md. 500, 69 Am. Dec. 172; Carter v. Hightower, 79 Tex. 185; and numerous

cases cited in the extended note to Cortleyeu v. Hathaway, 64 Am. Dec. 491. He must first exhaust his remedy at law, except as otherwise provided by statute: Pelzer v. Hughes, 27 S. C. 408. The existence of a local statute permitting a simple contract creditor to apply for a receiver is an exception to the rule making the existence of a lien a prerequisite to such an application: Fechheimer v. Baum, 37 Fed. Rep. 167. Compare Todd v. Lee, 15 Wis. 365, showing that a receiver may be had, under the Wisconsin statute, at the instance of creditors, to preserve the property of a feme covert who has become a sole trader, pending litigation over it. A receiver in a creditor's suit may be appointed after the return day of an execution: Osborn v. Heyer, 2 Paige, 342, 343; Bloodgood v. Clark, 4 Paige, 574. When a judgment creditor's bill has been filed, a receiver will be appointed, upon notice, to collect the debts and take care of the property, although there has been an assignment of the property by the judgment debtor, if an injunction has gone against the assignee restraining him from acting: Bank of Monroe v. Schermerhorn, Clarke Ch. 214; Austin v. Figueira, 7 Paige, 56; Hart v. Tims, 3 Edw. Ch. 226; Cook v. Detroit etc. R. R. Co., 45 Mich. 453; Dutton v. Thomas, 97 Mich. 93; Gage v. Smith, 79 Ill. 219.

The practice of appointing receivers, in cases of creditors' bills, to aid the enforcement of judgments, seems to be especially salutary; and in this class of cases receivers are almost uniformly granted before answer: See group of cases last cited; Weis v. Goetter, 72 Ala. 259, 261. When the existence of a judgment against a debtor is shown, the return of an execution unsatisfied, and the probable existence of property applicable to the satisfaction of the judgment, but which the creditor has been unable to reach by execution, the court is authorized to appoint a receiver: Gage v. Smith, 79 Ill. 219; Bailey v. Pittsburgh etc. R. R. Co., 139 Pa. St. 213; Cadogan v. Lyric Theater, [1894] 3 Ch. 338; McCord v. Well, 83 Neb. 868. A receiver may be appointed and an injunction granted at the suit of a judgment creditor to restrain the debtor from selling his goods, notwithstanding a prior mortgage thereon, not yet due, to another person: Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170. Rings and jewelry are liable to seizure upon execution for debt, but, as it may be out of the sheriff's power to levy on or take possession of them on account of their being generally worn on the person, the court will, at the instance of a judgment creditor, appoint a receiver and order a delivery of them to the officer: Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666. So the assets of an estate of a decedent may be called in from the hands of a personal representative and placed in the hands of a receiver by a court of equity, especially in a creditor's suit: Davis v. Chapman, 83 Va. 67, 5 Am. St. Rep. 251.

As suggested above, unsecured creditors may, in certain cases, apply to a court of equity for relief before their claims are reduced to judgment, as where the debtor is an insolvent, and has assigned his property to one who is conspiring with him to defraud his cred-

itors, or where the property was obtained under false representations of which the assignee was cognizant, or where a large supply of goods was procured with a view of making an assignment, or where the property of the assignor is being disposed of and wasted, or where there has been a fraudulent assignment of the debtor's property, or where there has been other fraud which tends to imperil or jeopardize the rights of the creditor. In such cases, equity will interpose and appoint a receiver: *Albany etc. Steel Co. v. Southern etc. Works*, 76 Ga. 185, 2 Am. St. Rep. 26; *Citizens' Nat. Bank v. Minge*, 49 Minn. 454; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387; *Sackhoff v. Vandegrift*, 98 Ala. 192; *Haggarty v. Pittman*, 1 Paige, 298, 19 Am. Dec. 434. When an unsecured creditor seeks to have his debtor's assignment, conveyance, or mortgage set aside as fraudulent, and to obtain the appointment of a receiver, he must show that the defendant is insolvent, or that the property is in danger of being lost or materially injured: *Pelzer v. Hughes*, 27 S. O. 408; *Heard v. Murray*, 93 Ala. 127; *Bomar v. Means*, 53 S. O. 232; *Hirsch v. Israel*, 106 Iowa, 498. A simple contract creditor is sometimes expressly authorized by statute to file a bill to reach and subject property fraudulently conveyed by his debtor, and apply for a receiver to take charge and custody of the property: *Alabama etc. Steel Co. v. McKeever*, 112 Ala. 134; *Wels v. Goetter*, 72 Ala. 259; but independently of the statute such a bill and application have been held not demurrable on the ground of complainant's failure to show that he has reduced his claim to judgment: *Cohen v. Meyers*, 42 Ga. 46. Compare *Chautauque County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442. The appointment of a receiver in a fraudulent creditor's suit is no bar, under the Alabama statute, to a bill by another creditor, who was not a party to the first proceeding, although he is a simple contract creditor without a lien: *Alabama etc. Steel Co. v. McKeever*, 112 Ala. 134.

A judgment debtor's fraudulent conveyance, assignment, or mortgage of his property, for the purpose of hindering and defeating his creditors, is frequently made the foundation of a proceeding in equity for the appointment of a receiver on behalf of judgment creditors: *Milcou v. Moses*, 72 Ala. 439; *McCord v. Weil*, 33 Neb. 808; *Hirsch v. Israel*, 106 Iowa, 498. But an attachment of lands which have been fraudulently conveyed by an insolvent debtor, and the garnishment of the tenants in possession, does not justify the appointment of a receiver for such lands, and of the rents and profits thereof, at the instance of an attaching creditor, even after judgment, unless it is shown that the fraudulent grantee is insolvent, or that the property, or its rents and profits, are in danger of being lost or materially injured or impaired: *Clark v. Raymond*, 86 Iowa, 661, 668. See the extended note to *Chautauque County Bank v. White*, 57 Am. Dec. 450-452.

A receiver is not proper because it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution: *Harris v. Beauchamp*, [1894] 1 Q. B. 801; nor is one

proper in an action brought by one judgment creditor to set aside a deed of assignment for his own benefit, and not calling in other creditors: *Middleton v. Taber*, 46 S. C. 337. A judgment creditor's bill is not proper where the property could be taken on execution, and a receiver will be refused in such a case: *Parker v. Moore*, 3 Edw. Ch. 234. Compare *Congden v. Lee*, 3 Edw. Ch. 304. A receiver is not proper in a simple law action for debt aided by attachment: *State v. Elgith etc. Ct.*, 14 Mont. 577. Where the defendant's property is real estate, a court of equity is reluctant to grant a receivership in a creditor's suit and will be cautious in doing so: *Vause v. Woods*, 46 Miss. 120. To justify the appointment of a receiver at the instance of creditors, the circumstances set forth in the bill must show a manifest propriety and fitness to place the fund or property in the custody of the court, and, where they fail to do so, a receiver will be refused: *Fort Payne etc. Co. v. Fort Payne etc. Iron Co.*, 96 Ala. 472, 38 Am. St. Rep. 109; *Uhl v. Dillon*, 10 Md. 500, 69 Am. Dec. 172; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; *Buckley v. Baldwin*, 69 Miss. 804; *Dunston v. Hoptonic Co.*, 83 Mich. 372; *Furlong v. Edwards*, 3 Md. 99. As to the appointment of receivers in cases between debtor and creditor, see, also, the extended note to *Cortleyeu v. Hafhaway*, 64 Am. Dec. 491, and compare the subdivisions, "Fraud" and "Supplementary Proceedings," *infra*.

Decedents' Property.—A court of chancery has power to protect the property of an intestate, or testator, by appointing a receiver, pending litigation in the appropriate court for probate or administration, but, as a general rule, a court of equity will not interfere with the administration of decedents' estates by placing the assets thereof in the hands of a receiver, unless there is manifest danger of irreparable loss: *In re Colvin*, 3 Md. Ch. 278; *Thompson v. Orser*, 105 Ga. 482; *Dougherty v. McDougald*, 10 Ga. 121; *Simmons v. Henderson*, *Freem. Ch.* 493; *Harrup v. Winslet*, 37 Ga. 655, 660; *Werborn v. Kahn*, 93 Ala. 201, 208; *Rice v. Tonnele*, 4 Sand. Ch. 606; *Schlecht's Appeal*, 60 Pa. St. 172. A receiver for the purpose of dispossessing an executor or administrator is not proper, except in a very clear, strong case, in which there is imminent danger that the property in his charge will be imperilled or lost: *Dougherty v. McDougald*, 10 Ga. 121; *Powell v. Quinn*, 49 Ga. 523; *Delaney v. Tipton*, 3 Hayw. 14; *Marvine v. Drexel*, 68 Pa. St. 362; *Haines v. Carpenter*, 1 Woods. 262, affirmed in 91 U. S. 254. The mere poverty, bankruptcy, or insolvency of an executor or administrator is not enough to justify the appointment of a receiver for the property in his charge, where it does not appear from that fact, or others, that the property is in danger of loss, destruction, or material injury: *Harrup v. Winslet*, 37 Ga. 655, 660; *Johns v. Johns*, 23 Ga. 31; *Fairbairn v. Fisher*, 4 Jones' Eq. 390; *Howard v. Papera*, 1 Madd. 142; *Bryan v. Moring*, 94 N. C. 604; *Anonymous*, 12 Ves. 4. After an executor or administrator has taken hold of the property, and a receiver is not necessary, one will not be appointed: *Shannon v. Davis*, 64 Miss. 717. A

receiver to sell certain shares of stock, devised by will, is improper, where the probate court can fully protect the interests of all parties concerned: *Wanneker v. Hitchcock*, 38 Fed. Rep. 383. A receiver cannot be appointed in a proceeding to establish a will: *Bryan v. Moring*, 94 N. C. 694; nor for the estate of a dead man who is not represented by anyone before the court: *In re Shephard*, 48 Ch. Div. 131; contra, *In re Johnson*, 1 Ch. App. 325; nor where there is a mere misunderstanding between two executors: *Fairbairn v. Fisher*, 4 Jones' Eq. 390; nor where one executor has become bankrupt since the death of his testator, if his coexecutor is willing to continue to act: *Bowen v. Phillips*, [1897] 1 Ch. 174. A receiver should not be appointed until an opportunity to file a bond has been given; but where equity has taken jurisdiction by appointing a receiver, it cannot be ousted by the subsequent appointment of an administrator: *Blivins v. Marvin*, 96 Ga. 268; and a receiver should be refused where charges of misconduct on the part of an executor are not sustained: *Blair v. Green*, 45 N. J. Eq. 671.

The equity jurisdiction to appoint a receiver for the estate of a decedent is confined to extraordinary cases. As said in *Randle v. Carter*, 62 Ala. 95, 102: "A strong case is required to induce the appointment of a receiver to take assets from the custody of an executor or administrator, displacing his authority. The executor is appointed by the testator, who has the right to declare in whom the management of his estate after his death shall be reposed. The administrator derives his authority from, and is, in a qualified sense, the officer of another court of exclusive jurisdiction, compelled to give and keep a bond, with sufficient sureties, for the prompt and faithful discharge of the trusts of the administration. The court is, therefore, reluctant to interfere with them by the appointment of a receiver. There must be actual misconduct or fraud, and immediate danger of loss, or the appointment of a receiver cannot be justified. A different rule obtains, and should obtain, than in the case of trustees. The court of probate has, by the constitution, a general jurisdiction over the grant of letters testamentary, and of administration, in which is involved the power of revocation. The grant may be revoked whenever gross misconduct is shown, or, whenever a necessity exists, additional security may be required. Protection against loss to creditors, legatees, or next of kin, and security for a faithful administration, are within the power of the parties and the competency of that court. There can but seldom be a necessity for the exercise of any other preventive or protective remedy than such as that court can afford, and hence, though a court of equity has the jurisdiction to appoint a receiver of the assets, practically taking the administration into its hands, the jurisdiction is not exercised, unless there is manifest danger of loss which may be irreparable." Ordinarily, it is not proper to appoint a receiver for the estate of a decedent, at the instance of a creditor, if it is not shown that the property will be insufficient to pay the debts, or where the rights of the creditor may be enforced in the

probate court: *McKaig v. James*, 66 Md. 583. In *Goodman v. Kopperl*, 169 Ill. 136, a simple contract creditor sought, by a bill in equity, to place a decedent's estate in the hands of a receiver for the purpose of administering it, thus taking the entire jurisdiction from the probate court, but the court dismissed the bill for want of equity, saying: "The principle is clearly established that a court of equity will not assume jurisdiction of the administration of estates except in extraordinary cases. Where the statute has pointed out a different mode of administration, and has prescribed a method by which the management of the estates of decedents is to be had at law, equity will not interfere. There are no instances in which resort to a court of equity has been recognized, under our later decisions, before the claim of the creditor has been allowed against the estate by the probate court. Then, if special reasons exist why that court cannot afford relief, the creditor may call on a court of equity to aid him to secure such relief, but not otherwise: *Armstrong v. Cooper*, 11 Ill. 560; *Wood v. Johnson*, 18 Ill. App. 548; *Garvin v. Stewart*, 59 Ill. 229; *Heustis v. Johnson*, 84 Ill. 61; *Crain v. Kennedy*, 85 Ill. 340; *Scripps v. King*, 103 Ill. 469; *Freeland v. Dasey*, 25 Ill. 266; *Harris v. Douglas*, 64 Ill. 466; *Winslow v. Leeland*, 128 Ill. 304; *Duval v. Duval*, 153 Ill. 49. While in some of the earlier cases in this state it is held that equity retains a general jurisdiction over administrators, concurrent with that exercised by probate courts, yet the rule as now declared is, that courts of equity will not exercise jurisdiction over the administration of estates except in extraordinary cases; and by the liberal statutory rules for the settlement of estates, based on equitable principles and enforced in courts of probate, the reasons for equitable jurisdiction in such cases are greatly restricted. Probate courts are established for the settlement of such estates, and questions arising in the course of administration are decided by them, to the practical exclusion of the jurisdiction of courts of equity. In this case, the complainant had a right, as a creditor, to take out letters of administration upon the estate of this intestate and administer and distribute that estate under the orders of the probate court, in accordance with the statute; and if there is a fraudulent conveyance which should be set aside, complainant, as such creditor, might file his bill for the purpose of setting the same aside, and call upon a court of chancery to give relief where the case is one in which the probate court has no power to grant such relief."

The "strong" or "extraordinary" cases in which a receiver may be appointed, seem, however, to be quite common in chancery practice. Thus, where an administrator or executor is wasting the effects of the decedent, or is otherwise misconducting himself to the injury of the estate, it has been held proper to appoint a receiver: *Ex parte Walker*, 25 Ala. 81, 104. Any serious misconduct, gross mismanagement, misuse, or misappropriation of funds by an executor or administrator which imperils the estate justifies the appointment of a receiver: *Middleton v. Dodswell*, 13 Ves. 266; *Ware v. Ware*, 42

Ga. 408; *Stairley v. Rabe*, McMull. Eq. 22; *Price v. Price*, 23 N. J. Eq. 428. Where a strong probability of the insufficiency of estate of a decedent to pay his debts is shown, a court of equity ought to interfere and appoint a receiver, if such a course will relieve the creditors from the hazard of losing their debts: *McKalg v. James*, 66 Md. 583. For other cases in which receivers have been appointed for the protection of creditors of a decedent's estate, see *Ex parte Walker*, 25 Ala. 81; *Chappell v. Akin*, 39 Ga. 177; *Barker v. Clark*, 12 Abb. Pr., N. S., 106; *Willis v. Sharp*, 46 Hun, 540. A receiver is proper where there is no one to take charge of the estate: *Flagler v. Blunt*, 32 N. J. Eq. 518, 522; as where the administrator or executor has died, or refuses to act: *Palmer v. Wright*, 10 Beav. 284; or has removed from the jurisdiction, leaving the property behind: *Elting v. First Nat. Bank*, 173 Ill. 368, 381. A receiver should be appointed where the sole executor and trustee has become bankrupt, though his assignees are not before the court: *In re Johnson*, 1 Ch. App. 325; but see *In re Shephard*, 43 Ch. Div. 131. A receiver may be appointed, at the instance of heirs, or the sureties upon an administrator's bond, where there is danger of loss or other injury to their interests, and such extraordinary relief is necessary: *Thompson v. Orser*, 105 Ga. 482. So when it is shown that the administrator of a deceased debtor is also the administrator of a fraudulent grantee of such debtor, and is selling the property under probate decrees as belonging to the estate of the grantee, and is himself insolvent, a receiver is properly appointed: *Werborn v. Kahn*, 93 Ala. 201. The insolvency of executors, and their misapplication of the decedents' property in their hands, justifies the appointment of a receiver: *Jenkins v. Jenkins*, 1 Paige, 243; particularly where the estate itself is also insolvent: *Harmon v. Wagener*, 33 S. C. 487. So in a suit for a receiver brought by the alleged next of kin and collateral heirs of a decedent, who in his lifetime deeded all of his property to the defendant, and where the complainants attack the deeds as invalid, a necessity may arise, if there appears to be a probability that the complainants will establish title, in which it is best that a receiver be appointed to manage the estate and assets, regardless of the defendant's solvency: *Robinson v. Taylor*, 42 Fed. Rep. 803, 812. A receiver is proper against one who has obtained the assets of the deceased by falsely and fraudulently representing himself to be the executor, particularly in case of his insolvency: *Ex parte Walker*, 25 Ala. 81; and an order appointing a receiver will sometimes be delayed to give one entitled time in which to decide whether he will take out administration: *Waddell v. Waddell*, [1892] Prob. 226. For a further discussion of this subject, see the extended note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 488.

Disputed Title.—Whenever a contest over real property is simply a question of disputed title, the plaintiff asserting a legal title in himself against a defendant in possession, who is receiving the rents and profits under a claim of legal title, a receiver will not, ordinarily, be appointed, even if the defendant is insolvent, to take pos-

session of the property from him, or to receive the rents and profits thereof, except under urgent and peculiar circumstances wherein the property is in imminent danger of loss and the appointment of a receiver is required to preserve it: *Sengfelder v. Hill*, 16 Wash. 355, 58 Am. St. Rep. 36; *Rollins v. Henry*, 77 N. C. 467; *Twitty v. Logan*, 80 N. C. 69; *Mays v. Wherry*, 3 Tenn. Ch. 34; *Davis v. Reaves*, 2 Lea, 649; *Pfultz v. Pfultz*, 14 Md. 376; *Vause v. Woods*, 46 Miss. 120; *Cofer v. Echerson*, 6 Iowa, 502; *Clark v. Ridgely*, 1 Md. Ch. 70; *Mayo v. McPhaul*, 71 Ga. 758; *Venable v. Smith*, 98 N. C. 523; *Chicago etc. Min. Co. v. United States etc. Co.*, 57 Pa. St. 83; *Schlecht's Appeal*, 60 Pa. St. 172. Evidence of fraud in obtaining possession would justify a receiver: *Willis v. Corlies*, 2 Edw. Ch. 281; *Vause v. Wood*, 46 Miss. 120; *Venable v. Smith*, 98 N. C. 523. In a proceeding to recover the possession of land, the court has jurisdiction, under the English judicature act of 1873, to appoint a receiver, although the title is legal and the defendant is in possession; but such a case must be made as will justify the appointment: *Foxwell v. Van Grutten*, [1897] 1 Ch. 64. Where both the possession and title of real property are in dispute, a court of equity will not interfere in a suit concerning it by appointing a receiver, until the right to the possession is established at law: *St. Louis etc. R. R. Co. v. Dewees*, 23 Fed. Rep. 519; but in *Hlawacek v. Bohman*, 51 Wis. 92, 95, where the title to lands was in dispute, and claimed by both parties, and both parties claimed to be in possession, interfering with each other in harvesting the crops produced respectively by each, and threatening each other with physical violence, the court took a different view and regarded the situation as an appropriate one in which to appoint a receiver. In suits between adverse claimants, where each, as against the other, has obtained the appointment of a receiver, a third party, claiming adversely to the other litigants, may have the custody already assumed by the court continued until the rights of the parties can be adjudicated: *State v. Allen*, 1 Tenn. Ch. 512. A receiver will be appointed in a case where it has been decided that the defendant has no title, legal or equitable, to the property in dispute, if the plaintiff shows an equitable title to a part of the property in dispute, and a legal and equitable title to the remainder, and it is shown that a receiver is required to preserve the property: *Cole v. O'Neill*, 3 Md. Ch. 174, 185. A court of equity also has power to appoint a receiver for personal property, where the right to it is contested: *Tregaskis v. Judge*, 47 Mich. 509; *Battle v. Davis*, 66 N. C. 252; but the court ought to hesitate before appointing a receiver on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock of a railroad company: *Overton v. Memphis etc. R. R. Co.*, 3 McCrary, 436. Compare the subdivisions, "Ejectment," "Real Property," and "Vendor and Purchaser," *infra*.

Divorce and Maintenance.—A receiver may be appointed in a suit for divorce: *Bergen v. Bergen*, 22 Ill. 187; *Stillman v. Stillman*, 7 Baxt. 169, 173; as over rents and profits pending the litigation: *Vin-*

cent v. Parker, 7 Paige, 65; or to take charge of the husband's property, after allmomy has been decreed, where he attempts to dispose of his property to defraud his wife: Kirby v. Kirby, 1 Paige, 261; or in supplementary proceedings to enforce a judgment for allmomy: Barker v. Dayton, 28 Wis. 367; or where the husband fraudulently conveys his property to prevent his wife from obtaining allmomy on a bill pending for that purpose: Questel v. Questel, Wright, 492. Under the statute of California, the court may make the wife's allmomy a lien upon the husband's estate, and enforce the lien by appointing a receiver to collect the rents and profits, and to make a sale of the property: Huellmantel v. Huellmantel, 124 Cal. 583; and a receiver may be appointed to enforce a decree for maintenance, even before an answer is filed, if the wife can satisfy the court that she has an equitable claim to the property in controversy, and that a receiver is necessary to preserve it from loss: Murray v. Murray, 115 Cal. 260, 56 Am. St. Rep. 97; Anderson v. Anderson, 124 Cal. 48, 71 Am. St. Rep. 17.

Ejectment.—The contest, in actions of ejectment, being merely as to the legal title of the respective parties, a receiver of the rents and profits is not usually appointed pendente lite, unless some special equitable ground is shown entitling the plaintiff to them, or it is shown that sequestration is essential to his protection: People v. Mayor, 10 Abb. Pr. 111; Emerson's Appeal, 95 Pa. St. 258; Rollins v. Henry, 77 N. C. 467. A receiver will not be appointed to hold land pending an action of ejectment for its recovery, where the defendant was a bona fide purchaser: Whitworth v. Wofford, 73 Ga. 259. Nor will a receiver to harvest and sell crops be appointed pending the statutory new trial in an action of ejectment: Stephens v. Kaga, 142 Ind. 523, 528.

If the plaintiff makes a good showing of title, however, to the premises, a sequestration is essential and a receiver proper, where it appears that the defendant is insolvent, that he is collecting rents which he will not be able to refund on account of his insolvency, and that the estate is going to waste in consequence of his incapacity and neglect: Rogers v. Marshall, 6 Abb. Pr., N. S., 457, 38 How. Pr. 43; Ireland v. Nichols, 1 Sweeny, 208; 37 How. Pr. 222; Payne v. Atterbury, Harr. (Mich.) 414; and, where the plaintiff, in an action of ejectment, has recovered judgment, he is better entitled to a receiver pending further legal proceedings, where such appointment is necessary to preserve the rents and profits from loss: Whitney v. Buckman, 26 Cal. 447; Collier v. Sapp, 49 Ga. 93; Frisbee v. Timanus, 12 Fla. 300. The power to appoint a receiver may now be exercised in England under the judicature act of 1873, where the plaintiff is seeking to recover land by a legal title, though the application may practically compel the defendant, in an action of ejectment, to disclose his title: John v. John, [1898] 2 Ch. 573; Foxwell v. Van Grutten, [1897] 1 Ch. 64. So where the title of the defendant appears to be shadowy, but the plaintiff's title appears to be satisfactorily made out, subject to a point on the construction

of a will which the court considers very unlikely to be decided against him, a receiver ought to be appointed: *John v. John*, [1898] 2 Ch. 573, 581. In *Ulman v. Clark*, 75 Fed. Rep. 868, the court was asked to appoint a receiver to take charge of the royalty, rents, and profits of the coal mining land in litigation pending an action of ejectment to determine the rightful title as between the claimants, and held that one should be appointed, as the plaintiff showed that he had a probable cause of action, and that the benefit to be derived from his cause of action might be lost if a receiver was not appointed. The bill for a receiver in such a case will be treated as an ancillary proceeding to the action at law: *Ulman v. Clark*, 75 Fed. Rep. 868. See subdivision, "Disputed Title," *supra*.

Foreign Corporations.—The courts of one state may, at the instance of resident or domestic creditors, or even at the instance of a non-resident creditor, appoint a receiver for a foreign corporation doing business therein and having property there, notwithstanding the appointment of a receiver at the domicile of the corporation where the general requisites for a receivership are shown, as in other cases: *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917; *Buswell v. Supreme Order of Iron Hall*, 161 Mass. 224; *Security Sav. etc. Assn. v. Moore*, 151 Ind. 174; *Williams v. Hintermeister*, 26 Fed. Rep. 889; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Irwin v. Granite etc. Assn.*, 56 N. J. Eq. 244. But a receiver for a foreign corporation cannot be appointed if the corporation has no property in the state of the appointing court, and has not appeared or been served with process, and none of its officers or agents are to be found in that state: *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917; nor will one be appointed where it would be against the interest of citizens of the appointing state, and would serve no good purpose: *Borton v. Brines-Chase Co.*, 175 Pa. St. 209; or where the court has no jurisdiction over the subject matter of the suit, though insolvency is alleged: *Condon v. Mutual etc. Life Assn.*, 89 Md. 99; and, under the statute of Rhode Island, the supreme court has no power to appoint a receiver of the estate of a foreign corporation doing business in that state: *Stafford v. American Mills Co.*, 13 R. I. 310. To have a receiver of a foreign corporation appointed it is not necessary for the bill to allege that the defendant is doing business in this state at the time when the bill is filed. It is sufficient for it to appear that the corporation has done business here and has property here at the time of the filing of the bill, although the business has been entirely suspended: *Albert v. Clarendon etc. Agency Co.*, 53 N. J. Eq. 623. An attachment lien, rightfully acquired by a levy upon the property of a corporation, domestic or foreign, doing business in this state, and holding property here, is not defeated by a decree, in insolvency proceedings, dissolving the company and appointing a receiver for its property, but the corporation will be treated as still existing for the purpose of enforcing the attachment lien, by proceeding to judgment and execution: *Life Assn. v. Fassett*, 102 Ill. 315.

Fraud—Staying the Commission of Crime.—A receiver will be appointed to prevent fraud or to protect the rights of persons in property which has been obtained fraudulently, and which is in danger of being lost or of suffering material injury, unless a receiver is appointed to preserve it: *Wels v. Goetter*, 72 Ala. 259, 261; *Sackhoff v. Vandegrift*, 98 Ala. 192; *Oakley v. Paterson Bank*, 2 N. J. Eq. 178; *Lloyd v. Passingham*, 16 Ves. 59. A receiver is proper to sequester moneys in the hands of a sheriff, made upon executions against an insolvent corporation, as a part of the assets of the corporation, when they are the fruit of a fraudulent combination between the directors of the corporation and the execution creditor for the purpose of giving the latter an illegal preference over other creditors: *Ford v. Plankinton Bank*, 87 Wis. 363. A court, having jurisdiction to rescind a contract of purchase for fraud, and to restore the purchase money paid thereunder, which is still within its jurisdiction, has power to appoint a receiver of such money, to preserve it and retain it within the jurisdiction of the court, until the rights of the parties are adjudicated: *Loalza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197. A receiver is proper to preserve the assets of a corporation from being wasted and misappropriated in pursuance of a fraudulent conspiracy: *State v. Second etc. Dist. Ct.*, 15 Mont. 324, 48 Am. St. Rep. 682. So a receiver of the property of a corporation may be appointed pending proceedings for its dissolution, where the possession of the property by the court is essential to prevent a continuance of its use for an unlawful purpose, such, for instance, as giving an exhibition of prize fighting: *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407. In the case of a fraudulent purchase of goods, which are afterwards mortgaged, and where the sellers claim the goods as against the mortgagees, a receiver may be appointed to preserve the property until the question of title is passed upon, and the rights of the parties adjudicated, regardless of the solvency or insolvency of the mortgagees: *Exchange Bank v. H. B. Clafin Co.*, 100 Ga. 640; *Wolfe v. Clafin*, 81 Ga. 65; but compare *Atlantic etc. Ice Co. v. Bluthenthal*, 101 Ga. 541, showing that the unsecured creditors may identify and separate what goods they can from the debtor's common stock, and that there should be no receiver appointed, except for the purpose of taking charge of the goods so identified and separated, particularly where it is shown beyond dispute that the mortgagees are entirely solvent.

"It is well settled," says Merriam, J., in *Ellett v. Newman*, 92 N. C. 523, "that where there is reasonable ground to apprehend that, pending the litigation, property, the subject of it, will be disposed of fraudulently, or in such way as to deprive the complaining party of the fruit of his recovery when had, a court of equity will secure the property, or, in a proper case, have it sold and secure the fund arising from it by the appointment of a receiver, or by injunction, and, when need be, by both, until the action shall be tried on its merits. The authority of the court to preserve property, the sub-

ject of litigation, pending the action, until final judgment, and then to apply it, as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the interference of the court is necessary to protect the property in question pending the controversy." So the appointment of a receiver, especially at the instance of creditors, is proper, in an action to set aside a conveyance or transfer of property as fraudulent, where it is necessary for the preservation of the property from imminent danger of loss, waste, or material injury: *Clark v. Bradley etc. Cement Co.*, 6 D. C. App. 43; *Boston Inv. Co. v. Pacific etc. Bridge Co.*, 104 Iowa, 811; *Pearce v. Elwell*, 116 N. C. 595; *Shannon v. Hanks*, 88 Va. 338; *Brown v. Stanley*, 105 Ga. 409; *Bates v. International Co.*, 84 Fed. Rep. 518; *Lyle v. Commercial Nat. Bank*, 93 Va. 487; *Maxwell v. Peters*, 109 Ala. 371. But where no collusion or fraud is shown, and the purchaser is solvent, and there is otherwise no peril to the property, it is not proper to appoint a receiver: *Norris v. Lake*, 89 Va. 513; *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100; *Einstein v. Lee*, 89 Ga. 130; *Clark v. Raymond*, 86 Iowa, 661; *Turnipseed v. Kentucky Wagon Co.*, 97 Ga. 258; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81; *Kelly v. Boettcher*, 89 Fed. Rep. 125. Where a court of law had resumed jurisdiction by the attachment of property alleged to have been fraudulently conveyed, a court of equity will not interfere by appointing a receiver, except upon the assertion of a lien paramount to the demand upon which the previous possession was taken and is held: *Williams v. Desmukes*, 106 Ala. 402. If the title in a conditional sale has passed, the seller has no such right or interest in the property as entitles him to the appointment of a receiver, even where the purchaser is insolvent and is disposing of the goods and applying the proceeds to his own use, in violation of the terms of his contract: *Steele v. Aspy*, 128 Ind. 367. A receiver may, however, be appointed in case of a fraudulent confession of judgment, particularly when executions have been levied on the only property of the debtor within the state in favor of non-resident creditors who seek to take the property out of the state: *Stern v. Austern*, 120 N. C. 107; *Wagener v. Pape*, 46 S. C. 245.

Infants and Lunatics.—The appointment of receivers over the estates of infants and lunatics is discussed in the extended note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 490. A receiver for an infant's estate has been ordered before the service of a subpoena to appear: *Pitcher v. Helliar*, 2 Dick. 580. In cases of idiots, lunatics, and infants, the pendency of a suit is not a prerequisite to the appointment of a receiver. Such cases are an exception to the general rule in this respect: *Jones v. Bank*, 10 Colo. 464, 473. A receiver for the estate of a lunatic is proper, but the power of appointment is necessarily a discretionary one, and should be exercised only upon notice: *In re Colvin*, 3 Md. Ch. 278, 282, 288; *In re Misselwitz*, 177 Pa. St. 359; *In re Hybart*, 119 N. C. 359. The appropriate court of this state may appoint a receiver for property in this state which belongs to a

lunatic who resides in another state and who has been committed to a lunatic asylum in that state: *Beall v. Stokes*, 95 Ga. 357. In England a receiver cannot be appointed to take charge of the estate of a person who is detained as a lunatic in a foreign country: *In re Watkins*, [1896] 2 Ch. 336.

Injunction and Receiver.—An injunction is sometimes made an adjunct to a receivership, and, in a proper case, a court is authorized to appoint a receiver in connection with an injunction; but a receivership does not necessarily follow an injunction, for they are distinct remedies, though an order directing the issue of an injunction and the appointment of a receiver is a unit: *Ellett v. Newman*, 92 N. C. 519, 523; *Garretson v. Weaver*, 3 Edw. Ch. 385; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173, 170; *Schlecht's Appeal*, 60 Pa. St. 172. The order appointing a receiver is itself an injunction: *Schlecht's Appeal*, 60 Pa. St. 172.

Insolvency.—"While insolvency of the defendant in possession, and against whom a receiver is sought, is frequently relied upon by the court as a ground of granting the relief, it is to be observed that insolvency alone will not, of itself, warrant a court in appointing a receiver. It must also appear that the plaintiff has a probable cause of action against the defendant, and that the benefit to result from his recovery will either be wholly lost, or substantially impaired, by reason of the insolvency, unless a receiver is appointed": *Lawrence Iron Works Co. v. Rockbridge Co.*, 47 Fed. Rep. 755, quoting from and approving *High on Receivers*, sec. 18, p. 19. The defendant's insolvency may or may not be cause for appointing a receiver. If it puts the property in danger, it is cause for a receiver; otherwise it is not, unless made a statutory ground for a receivership: *Farmers' Loan etc. Co. v. Chicago etc. Ry. Co.*, 27 Fed. Rep. 146; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Rawnsley v. Trenton Mut. Life Ins. Co.*, 9 N. J. Eq. 347; *Merrill v. Elam*, 2 Tenn. Ch. 513; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 128; *Cook v. East Trenton Pottery Co.*, 53 N. J. Eq. 29; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387, 397; *Cofer v. Echerson*, 8 Iowa, 502; *Chase's case*, 1 Bland, 206, 17 Am. Dec. 277; *Steinberger v. Independent etc. Sav. Assn.*, 84 Md. 625; *Willcox v. Dunlap*, 83 Ga. 417; *Pendleton v. Johnson*, 85 Ga. 840; *Miller v. Southern etc. Lumber Co.*, 53 S. C. 364. The insolvency of one in possession of real estate is ground for a receiver if the plaintiff shows no title: *Ryder v. Bateman*, 93 Fed. Rep. 16. In such a case, there must be a reasonable probability that the complainant's right will be established, and that the property is in danger; both of which conditions should be established to the satisfaction of the court. In the absence of such proof, the insolvency of the defendant is immaterial, as is also the question whether the defendant has the legal title, or whether the entire beneficial interest, with the bare legal title, has been vested in a trustee: *Ryder v. Bateman*, 93 Fed. Rep. 16. Under the statute of Minnesota any creditor having a claim of the required amount may petition for a receiver over the property of an insolvent: *Citizens' Nat.*

Bank v. Minge, 49 Minn. 454. Insolvency is that condition of a debtor when his entire property and assets are insufficient to pay his debts: *Miller v. Southern etc. Lumber Co.*, 53 S. C. 364, 366. Compare the subdivisions, "Bankruptcy" and "Corporations," for questions of insolvency peculiar to such cases.

Insurance Companies.—It seems that, in a proper case, a receiver may be appointed for an insurance company: *Harrison v. Ouston etc. Life Ins. Co.*, 78 Ga. 716, 732; as where it has become insolvent and conveyed its property in trust for the benefit of creditors, subject to certain conditions and preferences: *Buck v. Piedmont etc. Life Ins. Co.*, 4 Fed. Rep. 849. Unless such a company is insolvent, there is no occasion for a receiver, and, where the statute provides for a receiver in such cases, the policy-holders must abide by their contract: See *Betts v. Connecticut etc. Assn.*, 71 Conn. 751; *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. Rep. 305; *Relfe v. Rundle*, 103 U. S. 222.

Judicial Sales.—After a judicial sale, if the judgment debtor remains in possession, and uses the property, such as a mine, the purchaser may have a receiver appointed for his protection, where the defendant is insolvent and waste will follow: *Hill v. Taylor*, 22 Cal. 191, 194. So where the plaintiff has obtained a sheriff's deed and is entitled to possession of land, he may have a receiver to take possession, harvest and preserve crops growing thereon: *Corcoran v. Doll*, 35 Cal. 476, 480. Where the bill shows that the complainant's right to the property in question is by his purchase at a sheriff's sale, that the defendant's possession of it was obtained by fraud, and that the rents and profits of the property are in danger of being lost to the complainant, by reason of the fraud, insolvency, or irresponsibility of the defendant, it is proper to appoint a receiver: *Mays v. Rose*, *Freem. Ch.* 703, 720; but, as a purchaser of land at a judicial sale is not entitled to the rents and profits for the period between the sale and its confirmation, a receiver cannot be appointed to collect them during the time while the effect of the order confirming the sale is suspended by an appeal therefrom: *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844.

Lien or Special Right.—In a case of necessity, such as danger of loss or of material injury to property, a receiver may be appointed whenever the complainant has a lien or a special right to have the property or funds in controversy applied to the payment of his claim: *Wels v. Goetter*, 72 Ala. 259, 261; *Woodward v. Woodward*, Ky., June, 1895; as where it is sought to subject a debtor's real estate to the discharge of liens upon it: *Grantham v. Lucas*, 15 W. Va. 425, 431. The purpose, in such cases, is to preserve the rents and profits, but the complainant in a proceeding to foreclose a mechanic's lien is not, in the absence of statutory authority, entitled to a receiver of the rents and profits of the property, *pendente lite*: *Stone v. Tyler*, 178 Ill. 147. See subdivision, "Attachment," *supra*.

Mines.—A mine is property of that peculiar character which it is best to keep a "going concern," under ordinary circumstances, and a court will always take this fact into consideration when asked, pending litigation involving the property, to appoint a receiver for it.

Such property is also of that peculiar character as to which an injunction should not ordinarily issue, except where others are injured by the working of the mine. Hence, in a controversy over rights in a mine, a court, instead of issuing an injunction, should appoint a receiver to work the mine and take charge of its rents and profits, care being taken to allow the defendant to give security in all cases where he may choose to do so. Just how far a court may lawfully embark property seized by it in industrial enterprises depends, of course, upon how far such conduct may be fairly necessary to the preservation of its existing status, taking into consideration the character of the property, the uses to which it may be applied, and how far, and to what extent, use may be necessary to its preservation: *Gibbs v. David*, L. R., 20 Eq. 373; *Carter v. Hoke*, 64 N. C. 348; *Parker v. Parker*, 82 N. C. 105; *Fischer v. Superior Court*, 98 Cal. 67; *Bigbee v. Summerour*, 101 Ga. 201; *Falls v. McAfee*, 2 Ired. N. C. 236, 239; *Deep River etc. Min. Co. v. Fox*, 4 Ired. Eq. 61, 75; *Stith v. Jones*, 101 N. C. 360. Compare *Coaldale Min. etc. Co. v. Clark*, 43 W. Va. 84. If the title to mining property is involved in litigation, it is not proper to appoint a receiver unless the parties in possession are insolvent, or are injuring the property by mismanagement: *Carter v. Hoke*, 64 N. C. 348. A court will not ordinarily appoint a receiver for mining partnership property, at the instance of one of the partners, unless a dissolution is sought: *Roberts v. Eberhardt, Kay*, 148. See subdivisions. "Disputed Title" and "Judicial Sales," *supra*.

Mortgaged Property.—The question as to when a receiver may be appointed to take charge of mortgaged property in foreclosure proceedings is quite fully discussed in the extended notes to *Cortleyeu v. Hathaway*, 64 Am. Dec. 492-494, and *Hardin v. Hardin*, 27 Am. St. Rep. 794-798. It is sometimes provided by statutes that a receiver may be appointed for the mortgaged property, in such cases, where the security is inadequate: *Connelly v. Dickson*, 76 Ind. 440, 444; *Hursh v. Hursh*, 99 Ind. 500; *Scott v. Hotchkiss*, 115 Cal. 89, 94; and it is sometimes held, independently of the statute, that if the security is inadequate, and the mortgagor is insolvent, or unable to pay any deficiency that might remain after a sale of the property mortgaged, a receiver may be appointed: *Myers v. Estell*, 48 Miss. 372; *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140, 150; *Kerchner v. Fairley*, 80 N. C. 24; *Durant v. Crowell*, 97 N. C. 367, 374; *Bank v. Arnold*, 5 Paige, 38; *Hughes v. Hatchett*, 55 Ala. 631, 634; *Des Moines Gas Co. v. West*, 44 Iowa, 23; *Price v. Dowdy*, 34 Ark. 285, 290; *Phillips v. Elland*, 52 Miss. 721; *Philadelphia etc. Trust Co. v. Goos*, 47 Neb. 804; *Hart v. Respass*, 89 Ga. 87; *Astor v. Turner*, 11 Paige, 436, 43 Am. Dec. 766; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; but irrespective of the statute it seems that the prevailing rule is that inadequacy of security and insolvency of the mortgagor are not in themselves regarded as sufficient grounds to justify the appointment of a receiver in foreclosure proceedings. There must be shown some additional, distinct, equitable ground, such as danger of loss, waste, destruction, or serious impairment of

the property, to warrant the appointment of a receiver. Courts of equity, however, always have the power, when the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is fraud or bad faith, or good cause to believe that the property will be wasted or deteriorated in the hands of the mortgagor, as by the cutting of timber, suffering dilapidation, et cetera, to take charge of the property by means of a receiver and preserve not only the corpus, but the rents and profits, for the satisfaction of the debt. If such good cause is not shown, in addition to inadequacy and insolvency, a receiver will be refused in a foreclosure suit; otherwise, one will be appointed at any stage of the case: *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 395; *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 117; *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Morrison v. Buckner*, Hemp. 442; *Hyman v. Kelly*, 1 Nev. 179; *Marshall etc. Bank v. Cady*, Minn., April, 1899; *Cone v. Combs*, 18 Fed. Rep. 576; *National Fire Ins. Co. v. Broadbent*, Minn., June, 1899; *Farmers' Nat. Bank v. Backus*, 64 Minn. 43; *Hollenbeck v. Donnell*, 94 N. Y. 342, 345; *Sales v. Lusk*, 60 Wis. 490; *Morris v. Branchand*, 52 Wis. 187; *Schreiber v. Carey*, 48 Wis. 208; *Finch v. Houghton*, 19 Wis. 149, 158; *Brundage v. Home etc. Loan Assn.*, 11 Wash. 277; *Phoenix Mut. Life Ins. Co. v. Grant*, 3 McAr. 220; *Worrill v. Coker*, 56 Ga. 666; *Williams v. Noland*, 2 Tenn. Ch. 151, 153; *Brasted v. Sutton*, 30 N. J. Eq. 462; *Haugan v. Netland*, 51 Minn. 652; *Whitehead v. Hale*, 118 N. O. 601.

The cases above cited in this subdivision show that the court may, even when the mortgage does not, by express words, give a lien upon the income derived from the mortgaged property, appoint a receiver to take charge of it and collect the rents, issues, and profits arising therefrom; that such action will not be taken unless it is made to appear that the mortgaged premises are an insufficient security for the debt and the person liable personally for the debt is insolvent, or at least of very questionable responsibility; and that, as a general rule, not only a combination of these two things is required, but still another element—that is, some such equitable ground as waste, danger of loss, or other peril to the property—should be conjoined with the elements of inadequacy and insolvency before the appointment of a receiver is justified. The appointment, however, when warranted by the facts, may be made even after a decree and sale, during the period for redemption: *Merritt v. Gibson*, 129 Ind. 155; *Connelly v. Dickson*, 76 Ind. 444; *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140; *Henshaw v. Wells*, 9 Humph. 567; *Swan v. Mitchell*, 82 Iowa, 307. The statute of California provides that the purchaser, from the time of the sale until redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, but this does not warrant the appointment of a receiver to oust the judgment debtor from his possession, and take from him the possession of the growing crops: *West v. Conant*, 100 Cal. 231, 233.

A stipulation in a mortgage that, in case foreclosure proceedings are instituted, a receiver may be appointed to take the rents, profits, and crops, and apply them on the debt, has been held not to enlarge, in any degree, the mortgagee's rights as to the appointment of a receiver, for the court will appoint a receiver, in a proper case, without any such stipulation; and, in any other case, it will not appoint one, whatever the parties may have agreed: *Thomson v. Shirley*, 69 Fed. Rep. 484. Compare *Edwards v. Standard etc. Stock Syndicate*, [1893] 1 Ch. 574; *Phoenix Mut. Life Ins. Co. v. Grant*, 3 McAr. 220; *Morrison v. Buckner*, Hemp. 442; *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140. A stipulation between the parties for a receiver certainly cannot affect the rights of others, or authorize a court of equity to appoint a receiver in a case where the court has no such authority given by law: *Scott v. Hotchkiss*, 115 Cal. 89. Such a stipulation is considered to be contrary to the public policy of the state of Oregon, and the appointment of a receiver under it to be void: *Couper v. Shirley*, 75 Fed. Rep. 168. When the mortgage creates a lien upon the rents and profits, a receiver may be appointed after a foreclosure decree and sale, with power to collect the rents and profits during the period of redemption, and it could not have been ascertained before the sale whether there would be any deficiency necessitating such appointment: *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140; *Hubbell v. Avenue Inv. Co.*, 97 Iowa, 135. The purchaser at a sale under a power in a mortgage is entitled to the rents subsequently accruing, and if the mortgagor and his tenants refuse to attorn to him, are insolvent and are disposing of the crops, he is entitled to a receiver: *American etc. Mtg. Co. v. Turner*, 95 Ala. 272.

A statute providing that, "in the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof," does not abrogate the power of the court to appoint a receiver in a proper case, to collect the rents and profits from mortgaged property, although the mortgage has no stipulation as to the right of possession: *Philadelphia etc. Trust Co. v. Goos*, 47 Neb. 804. Compare *Norfor v. Busby*, 19 Wash. 450. Neither does a statute declaring that a mortgage of real property shall not be deemed a conveyance, so as to enable the mortgagee to recover possession without foreclosure, abrogate the power of the court to appoint a receiver of such property in an action to foreclose the mortgage, when that becomes necessary to protect such equitable rights of the mortgagee as do not rest upon the common-law principle of a legal estate transferred by the mortgage: *Lowell v. Doe*, 44 Minn. 144. The statute of Indiana authorizes the appointment of a receiver, in a suit to foreclose a mortgage, without reference to the solvency of the mortgagor, when it appears that the mortgaged property is insufficient to pay the debt, and the receiver may be authorized to take possession of the land and crops growing thereon, though the mortgagor is at the time in possession: *Hursh v. Hursh*, 99 Ind. 500, 504. The statute of Michigan takes away from the mortgagee the right to the possession until foreclosure is completed by

sale, and the sale has become absolute by confirmation. The federal courts sitting in that state are, therefore, deprived of the power to appoint a receiver of the rents and profits on the ground that the security is inadequate: *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 87 Fed. Rep. 286; but effect has been given in that state to a contract authorizing the appointment of a receiver to collect the rents and profits of premises pending foreclosure proceedings: *Belding v. Meloche*, 113 Mich. 223.

The beneficiary in a deed of trust upon property subject to prior liens, which affords but a precarious security for his debt, and is all that the debtor owns, is entitled to have a receiver appointed of the rents and profits to the same extent as if his encumbrance were a mortgage: *Pearson v. Kendrick*, 74 Miss. 235; and the fact that the condition exists which authorizes trustees to take possession of mortgaged property, and their refusal to take possession, are sufficient grounds for the appointment of a receiver: *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514.

A receiver in a mortgage foreclosure case is proper to prevent fraud, injustice, or loss of security: *Hyman v. Kelly*, 1 Nev. 179; and the power of a court of equity to appoint a receiver, in such cases, is a part of its incidental jurisdiction, and does not depend upon any statute: *United Trust Co. v. New York etc. Ry. Co.*, 101 N. Y. 478. "The court impounds the property by virtue of its inherent power to enforce the equities which come within its cognizance": *Price v. Dowdy*, 34 Ark. 285, 290; but, instead of appointing a receiver, where there is danger of loss of rents and profits, it may allow the defendant to execute a bond to secure the plaintiff: *Durant v. Crowell*, 97 N. C. 367. The appointment of a receiver does not deprive the defendant of the property in violation of that provision of the federal constitution regarding due process of law: *St. Louis etc. Ry. Co. v. Missouri*, 156 U. S. 478.

A receiver in mortgage foreclosure cases is proper where, in addition to the inadequacy of the security and the insolvency of the mortgagor, the security is in peril from the maturity of taxes or the lapse of insurance, or failure to keep down interest, et cetera: *Jackson v. Hooper*, 107 Ala. 634; *Neeves v. Boos*, 86 Wis. 313, 318; *Schreiber v. Carey*, 48 Wis. 208; *Appleton Waterworks Co. v. Central Trust Co.*, 93 Fed. Rep. 286; *Stetson v. Northern Inv. Co.*, 101 Iowa, 435; *Harris v. United States etc. Inv. Co.*, 146 Ind. 265; *Chetwood v. Coffin*, 30 N. J. Eq. 450; *Mahon v. Crothers*, 28 N. J. Eq. 567; *Johnson v. Tucker*, 2 Tenn. Ch. 398, 401; *Finch v. Houghton*, 19 Wis. 150; *Lowell v. Doe*, 44 Minn. 144; *Haugan v. Netland*, 51 Minn. 552; *Farmers' Nat. Bank v. Backus*, 64 Minn. 43; particularly where the mortgagor does not occupy the property: *Harris v. United States etc. Inv. Co.*, 146 Ind. 265; or allows it to fall into disuse: *Lowell v. Doe*, 44 Minn. 144; or where the owner of the equity of redemption, being in possession, endeavors to or obtains tax deeds upon the mortgaged property to defeat the mortgage: *Finch v. Houghton*, 19 Wis. 150; *Appleton Waterworks Co. v. Central Trust Co.*, 93 Fed. Rep. 286; or

where an assignee, under a general assignment, is in possession, and fails to pay the taxes or to keep up the insurance: *Winkler v. Magdeburg*, 100 Wis. 421. A receiver may be appointed, though the mortgagees have taken possession of part of the property: *County etc. Bank v. Rudry Merthyr etc. Colliery Co.*, [1895] 1 Ch. 629; or to take charge of mortgaged premises, exclusive of the mortgagor's homestead: *Nash v. Meggett*, 89 Wis. 486; *Schreiber v. Carey*, 48 Wis. 208; or to take charge of land mortgaged until the priority of liens thereon is established, when the property has been cultivated in a wasteful and destructive manner and has been allowed to deteriorate in value: *Dunlap v. Hedges*, 35 W. Va. 287. A receiver to collect rents may be appointed at the instance of a junior mortgagee: *Buchanan v. Berkshire etc. Ins. Co.*, 96 Ind. 510; and a receivership may be continued, when necessary, after a final decree of foreclosure: *Buchanan v. Berkshire etc. Ins. Co.*, 96 Ind. 510. An injunction may be issued and a receiver appointed to protect, from foreclosure, mortgages made in aid of a void assignment, at the instance of unsecured creditors, who are not parties to such mortgage: *Albany etc. Steel Co. v. Southern etc. Works*, 76 Ga. 135, 2 Am. St. Rep. 26; and in Indiana, where the security is inadequate, a receiver may be appointed to collect the rents and profits, or to operate the property during the year of redemption, either before or after an assignment for the benefit of creditors: *Sweet etc. Co. v. Union Nat. Bank*, 149 Ind. 305. A receiver, upon the proper showing, may be appointed in an action to cancel a mortgage: *Lovett v. Slocumb*, 109 N. C. 110; and a mortgagee, before having a right to foreclose, may have a receiver appointed in case of danger of loss of the goods mortgaged: *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170.

On the other hand, it is held that the appointment of a receiver is not authorized where the property, on foreclosure and sale, will pay the debt: *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 35, 50; *Callanan v. Shaw*, 19 Iowa, 183; *Lindsay v. American Mortgage Co.*, 97 Ala. 412; or where it would not improve matters, and possibly make them worse, as by destroying the value of a business of a peculiar character: *Lancaster v. Asheville etc. Ry. Co.*, 90 Fed. Rep. 129; *Trust etc. Co. v. Spartanburg Waterworks Co.*, 91 Fed. Rep. 324; *Provident etc. Trust Co. v. Keniston*, 53 Neb. 86; *Whitehead v. Hale*, 118 N. C. 601; or where a plaintiff seeks to intercept the rents and profits and divert them to his own use to the prejudice of prior mortgagees: *Sales v. Lusk*, 60 Wis. 490; or where the judgment creditor has not offered to reconvey, if he is secured by an absolute conveyance and has given a bond to reconvey: *Mackenzie v. Howard*, 93 Ga. 236; or where the assignee of the mortgagor is defending the property from a sale under a pretended chattel mortgage: *Hutchinson v. First Nat. Bank*, 133 Ind. 271, 36 Am. St. Rep. 537; or where the application for a receiver fails to show any statutory or equitable grounds upon which it may stand: *Sellers v. Stoffel*, 139 Ind. 468; *Swan v. Mitchell*, 82 Iowa, 307; *Morris v. Branchaud*, 52 Wis. 187; or where, pending foreclosure, a solvent stranger is in possession, claiming adversely by

virtue of his purchase at an execution sale of the mortgaged premises: *Warren v. Pitts*, 114 Ala. 65; or to take charge of and administer mortgaged property, though it is alleged that the mortgage was fraudulent, if the answer denies the charge and the evidence shows that it was given for an honest purpose: *Atlanta etc. Ice Co. v. Bluthenthal*, 101 Ga. 541; or where there is an action pending to set aside a deed absolute in form on the ground that it was intended as a mortgage: *McCool v. McNamara*, 19 Abb. N. C. 344; or where the mortgagor has made a general assignment for the benefit of all of his creditors, and is doing no injury to the property, and is threatening none: *Seignious v. Pate*, 32 S. C. 134, 17 Am. St. Rep. 846; or where the applicant claims a subsequent lien on the mortgaged property by seizure under execution, but the court, in such a case, will compel the application of the rents and profits, by injunction, to the satisfaction of the mortgage: *United States v. Masich*, 44 Fed. Rep. 10. It is not proper to appoint a receiver for property not embraced in the mortgage: *St. Louis etc. Ry. Co. v. Whitaker*, 68 Tex. 636; and if a mortgagee has secured possession of the mortgaged premises without fraud, and there is any indebtedness due under the terms of the mortgage, the mortgagee cannot be deprived of possession by the appointment of a receiver: *Brundage v. Home etc. Loan Assn.*, 11 Wash. 277. There is some question as to whether, in any case, a receiver should be appointed to take possession and charge of a mortgagor's homestead, pending proceedings to foreclose: *Callanan v. Shaw*, 19 Iowa, 183; *Nash v. Meggett*, 89 Wis. 486. That a mortgagee is not entitled to a receivership for the protection of an unmatured portion of the debt, or of that portion of the premises as to which his right to sell has not yet accrued, see *Hollenbeck v. Donnell*, 94 N. Y. 342; but, if the whole debt will become due before there can be a sale under the judgment in foreclosure, the case should be treated as if the whole debt were due: *Schreiber v. Carey*, 48 Wis. 208. In those jurisdictions where the first mortgagee has the legal right to the rents and the profits, a court of equity is reluctant to appoint a receiver upon his application, for the reason that he has a remedy at law, by ejectment, to obtain their possession, but, as subsequent mortgagees have no right to the possession at law, as against the prior mortgagees, they are better entitled to relief, and a receiver will generally be appointed at their suit, if the first mortgagee refuses to exercise his legal rights: *Cortleyeu v. Hathaway*, 11 N. J. Eq. 30, 64 Am. Dec. 478. Compare the extended note to *Hardin v. Hardin*, 27 Am. St. Rep. 703, discussing the right to rents and profits. The fact that a mortgagee in possession of premises is committing waste does not justify the appointment of a receiver, in the absence of any showing that the mortgagee is insolvent: *Brundage v. Home etc. Loan Assn.*, 11 Wash. 277; and it may be observed that a mortgagee of land, even after condition broken, and upon the insolvency of the mortgagor, and insufficiency of the mortgaged premises, is not entitled, as of "legal right," to the appointment of a receiver pendente lite to collect the rents and profits.

and apply them to the payment of the mortgage debt: *Seignious v. Pate*, 32 S. C. 134, 17 Am. St. Rep. 846. Neither should a receiver be appointed because of anticipated facts which might justify such an appointment; the necessary facts must exist to authorize it: *Chadron Banking Co. v. Mahoney*, 43 Neb. 214. A receiver should not be appointed in a foreclosure suit except in a case authorized by statute, or one which clearly invokes the exercise of the equitable jurisdiction of the court to grant such relief: *Sales v. Lusk*, 60 Wis. 400.

The same principles apply to chattel mortgages. If the petition to foreclose such a mortgage shows that the mortgagor is insolvent, that the mortgaged property is insufficient to secure the debt, and that there is danger of its loss, waste, or removal beyond the jurisdiction of the court, such facts justify a court in appointing a receiver for the property: *Reynolds v. Quick*, 128 Ind. 316; at the instance of the mortgagee: *Valley Nat. Bank v. H. B. Clafin Co.*, Iowa, May, 1899. Where the condition of a chattel mortgage has not been performed, and the property covered is a newspaper and printing office, greatly embarrassed by debts, and there are dissensions existing between the officers of the corporation which is carrying on the business that are likely to injure the value of the property, a receiver may be appointed, in an action by the mortgagee, to foreclose his mortgage and sell the property: *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93. So a receiver of personal property, in process of manufacture for the market, may be appointed in an action to foreclose a chattel mortgage thereon, if, by reason of prior liens, the mortgagee is not entitled to possession, and where the property will depreciate unless its manufacture and sale are continued: *Valley Nat. Bank v. H. B. Clafin Co.*, Iowa, May, 1899. The attachment and sale of personal property mortgaged, at the instance of unsecured creditors, does not defeat the paramount lien of the mortgage, so as to prevent the appointment of a receiver, on the application of the mortgagee, to take charge of the property: *Cooper v. Berney Nat. Bank*, 99 Ala. 119. A person whose only lien upon the property of another is that he holds a chattel mortgage thereon has no right, however, to have a receiver appointed for such property without a suit to foreclose such mortgage: *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209. Nor will a receiver be appointed, upon the mortgagee's bill to foreclose, for inadequacy of property, if the mortgagor will secure the plaintiff by a bond: *Williams v. Noland*, 2 Tenn. Ch. 151; or where it appears *prima facie* that the mortgagor is solvent: *Stillwell-Bierce etc. Co. v. Williamson etc. Fertilizer Co.*, 80 Fed. Rep. 68. As to the appointment of receivers for railroad property mortgaged, see subdivision, "Railroads," *infra*.

Partnership.—The appointment of receivers in partnership cases is discussed at some length in the extended notes to *Cortleyeu v. Hathaway*, 64 Am. Dec. 486, and *Slemmer's Appeal*, 98 Am. Dec. 266. The power to appoint a receiver in the settlement of partnership affairs

is inherent in the court, and not dependent upon any statute: *Oax v. Volkert*, 86 Mo. 505, 511; and the proper way to put partnership property in custodia legis is by the appointment of a receiver: *McIntosh v. Perkins*, 13 Mont. 143. This should be done, however, only when the necessity therefor is imperative, and then the receivership should be of all of the partnership property, and not only of a part of it: *Morey v. Grant*, 48 Mich. 326. A receivership, at the instance of a partner, is proper to prevent waste and misapplication of the firm assets by his copartner: *Allen v. Cooley*, 53 S. O. 414; *Drury v. Roberts*, 2 Md. Ch. 157; or where there is a breach of duty or a violation of the agreement of partnership on the part of the other partner: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Taylor v. Billey*, 86 Ga. 154; *Wilcox v. Pratt*, 125 N. Y. 688, 690. But it is not proper to appoint a receiver merely to determine conflicting rights to a fund, and there is no danger of loss or removal: *McIntosh v. Perkins*, 13 Mont. 143.

Where irreconcilable differences exist between the members of a copartnership as to the management of the property, a receiver should be appointed: *Watson v. Bettman*, 88 Fed. Rep. 825, 830; *Whitman v. Robinson*, 21 Md. 30; and a receiver should also be appointed where differences, dissensions, or disagreements between partners are coupled with a breach of partnership duty, or violation of the partnership agreement: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; but mere differences or dissensions between partners, not endangering the partnership, do not constitute a good cause for a receiver: *Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255. A receiver will not be appointed merely because partners quarrel: *Henn v. Walsh*, 2 Edw. Ch. 129; nor because of a loss of confidence: *Coddington v. Tappan*, 26 N. J. Eq. 141; nor because of ill-feeling: *Loomis v. McKenzie*, 31 Iowa, 425; nor always for a failure to co-operate: *Robert v. Eberhardt*, Kay, 148, 152; nor upon any other slight ground: *Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255.

Any misconduct, fraud, or waste by a partner which puts the partnership assets in peril is ground for a receiver: *Watson v. Bettman*, 88 Fed. Rep. 825; *Shannon v. Wright*, 60 Md. 520; *Hamill v. Hamill*, 27 Md. 679; *Saylor v. Mockble*, 9 Iowa, 209; *Boyce v. Burchard*, 21 Ga. 74; *Arnold*, Petitioner, 15 R. I. 15; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Barnes v. Jones*, 91 Ind. 161; as where a partner willfully violates the terms of the partnership agreement: *New v. Wright*, 44 Miss. 202; or where the partners violate their agreement with the retiring partner: *West v. Chasten*, 12 Fla. 315; or where one of the partners is carrying on a separate trade for his own benefit with the firm's property: *Harding v. Glover*, 18 Ves. 281; or where a deliberate intent to ruin the firm business appears from the evidence: *Sutro v. Wagner*, 23 N. J. Eq. 388; *New v. Wright*, 44 Miss. 202; or where, after dissolution, the remaining partners continue to carry on the business, with the firm assets, upon their own account: *Madgwick v. Wimble*, 6 Beav. 495; or where one of the partners is wasting

the firm assets, or threatens to make an improper application of the partnership funds: *Williamson v. Wilson*, 1 Bland, 418; or where a surviving partner fails to keep proper accounts of sales of firm property, thus putting the estate in danger of loss, where he is insolvent: *Word v. Word*, 90 Ala. 81; or where a partner fails to contribute his portion of the capital stock: *Heathcot v. Ravenscroft*, 6 N. J. Eq. 113; or where the insolvent members of a firm attempt to appropriate the firm assets to the payment of their individual debts: *Davis v. Grove*, 2 Rob. (N. Y.) 134; or where a partner absconds: *Hamill v. Hamill*, 27 Md. 679; or where the defendants apply the partnership funds to their own uses, make false entries upon the books and prevent the plaintiff from having access to them, and willfully conceal from him the condition of the partnership business: *Barnes v. Jones*, 91 Ind. 161; or where the complaint shows other willful acts of fraud: *Watson v. Bettman*, 88 Fed. Rep. 825. If partnership assets are in peril from mismanagement, fraud, or misconduct of one or more of the partners, it is proper to appoint a receiver, whether before or after dissolution: *Drury v. Roberts*, 2 Md. Ch. 157; *Word v. Word*, 90 Ala. 81. Misconduct in excluding a partner, especially if accompanied by a fraudulent disposition of the firm's assets, is ground for the appointment of a receiver: *Speights v. Peters*, 9 Gill, 472; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Einstein v. Schnebly*, 89 Fed. Rep. 540; *Hottenstein v. Conrad*, 9 Kan. 435; *Terrell v. Goddard*, 18 Ga. 664; *Haight v. Burr*, 19 Md. 130; *Katz v. Brewington*, 71 Md. 79; *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477; *Siebert v. Siebert*, 1 Brewst. 531; *Gowan v. Jeffries*, 2 Ashm. 296; *Maynard v. Bailey*, 2 Nev. 313.

Upon a showing of the insolvency of, and waste or mismanagement by, one of the partners, a receiver should be appointed, either at the instance of the other partner, or of creditors, to take charge of the firm property, particularly where the defendant caused the insolvency by drawing out large sums of money in excess of the total of his capital: *Pini v. Roncoroni*, [1892] 1 Ch. 633; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172, 183; *Watson v. Bettman*, 88 Fed. Rep. 825, 829; or where there are mutual charges of waste: *Williamson v. Wilson*, 1 Bland, 418, 426. In suit by one partner to have a receiver appointed, an allegation of the defendant's insolvency is not necessary: *Allen v. Cooley*, 53 S. C. 414, 443; and the appointment of a receiver over partnership property will not be refused simply because the partner in possession is solvent, and able to respond to any judgment that may be rendered against him: *Hottenstein v. Conrad*, 9 Kan. 435. Compare *Wales v. Dennis*, 9 Wash. 308.

A receiver for a partnership is sometimes appointed without view of a dissolution, but such cases are exceptional. The general rule is, that a receiver will not be appointed unless a dissolution is intended, or is about to take place, or has occurred; and the facts alleged to justify the appointment must be such as would entitle the plaintiff, upon the final hearing of a suit for dissolution, to a decree: *Henn v. Walsh*, 2 Edw. Ch. 129; *Barnes v. Jones*, 91 Ind. 161; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Law v. Ford*, 2 Paige, 310; *Whitman*

v. Robinson, 21 Md. 30, 42; Shulte v. Hoffman, 18 Tex. 678. And, even after the dissolution of a partnership, equity will take hold of its affairs, through a receiver, only where there is a necessity existing therefor, to protect the interests of the parties: Cox v. Peters, 18 N. J. Eq. 39; Birdsall v. Collie, 10 N. J. Eq. 63; Hefsebower v. Buck, 64 Md. 15; Terrell v. Goddard, 18 Ga. 664; Wales v. Dennis, 9 Wash. 808; Dunn v. McNaught, 38 Ga. 179. The mere fact of the dissolution of a partnership does not give one partner an absolute right, as against his copartners, to have a receiver appointed: Pini v. Ronconori, [1892] 1 Ch. 683; Birdsall v. Collie, 10 N. J. Eq. 63; Barnes v. Jones, 91 Ind. 161; but the necessity for a receiver would appear, and one should be appointed, where the defendant partner, in a bill for closing up the partnership affairs, after a dissolution, is insolvent: Randall v. Morrell, 17 N. J. Eq. 343; or where no provision is made, either in the articles of copartnership or between the partners subsequently, for the settlement of the concern, and the partners cannot agree as to the disposition of the joint effects: Whitman v. Robinson, 21 Md. 30, 42; Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Paige, 479; Terrell v. Goddard, 18 Ga. 664; Mitchell v. Lister, 21 Ont. 22; or where all of the partners have divested themselves, by agreement, of the right to wind up the business: Maynard v. Bailey, 2 Nev. 313. So a receiver is proper, at the suit of creditors, where partners cannot agree and have applied for a dissolution: Rolfe v. Burnham, 110 Mich. 660. But it is not proper where the partners have, by agreement, placed the affairs of a dissolved firm in a settling partner's hands, to appoint a receiver and displace him, if he is 'responsible and no fraud or gross misconduct on his part is shown: Renton v. Chaplain, 9 N. J. Eq. 62; Hayes v. Heyer, 4 Sand. Ch. 517; Simon v. Schloss, 48 Mich. 233; Hefsebower v. Buck, 64 Md. 15; though it is otherwise where his conduct induces the conclusion that he has been or is likely to be untrue to the trust reposed in him: Coddington v. Tappan, 26 N. J. Eq. 141. A receiver will not be appointed at the instance of one of the parties to a joint venture, in the absence of fraud or mismanagement, or actual danger to the joint assets: Warwick v. Stockton, 55 N. J. Eq. 61. So if a partnership expires by limitation, and neither member of it wishes to continue the business, a receiver will not be appointed, on the application of one, to settle the affairs of the firm, where no mismanagement or improper conduct on the part of the defendant is shown: Bufkin v. Boyce, 104 Ind. 53.

That a partnership business is unprofitable is no ground for a receiver: Moles v. O'Neill, 23 N. J. Eq. 207; Shoemaker v. Smith, 74 Ind. 71; and it has been held that a court of chancery has no power to appoint a receiver to carry on the business of a partnership: Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198. It is true that a court of equity, in a suit between partners, will not appoint a receiver or provide for interim management of the partnership, when there is no prayer for a dissolution: Pirtle v. Penn, 8 Dana, 247, 28 Am. Dec. 70; and that, as a general rule, a court will not order the business of

a partnership to be continued by the receiver: *Wolbert v. Harris*, 7 N. J. Eq. 605; compare *Crane v. Ford*, 1 Hopk. Ch. 114; but where it is necessary to preserve the assets or goodwill of the business, a court of equity has exercised the power of appointing a receiver, to carry it on, under the direction of the court, until a sale of the business as a "going concern" could be consummated: *Taylor v. Neate*, 39 Ch. Div. 538; *Marten v. Van Schaick*, 4 Paige, 479; *McMahon v. McClernan*, 10 W. Va. 419; *Crane v. Ford*, 1 Hopk. Ch. 114; *Fischer v. Superior Court*, 98 Cal. 67.

It is proper, at the instance of representatives of a deceased partner, to appoint a receiver as against a surviving partner, where he does not act, or, if he does act, is guilty of fraud, waste, or misconduct which puts the assets in danger; otherwise it is not proper to deprive him of his right to the possession of the partnership property by the appointment of a receiver: *Connor v. Allen*, Harr. (Mich.) 871; *Word v. Word*, 90 Ala. 81; *Holden v. M'Makin*, 1 Pars. Sel. Cas. 270; *Adams v. Hannah*, 97 Ga. 515; *Davis v. Amer*, 3 Drew. 64; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Miller v. Jones*, 39 Ill. 54; *Walker v. House*, 4 Md. Ch. 39; *Helme v. Littlejohn*, 12 La. Ann. 298. But, if both partners are dead, and the representatives of one institute a suit for an account against the representatives of the other, a receiver will be appointed, as a matter of course: *Walker v. House*, 4 Md. Ch. 39. If the surviving partner is abundantly responsible, and able to do justice on a final accounting, and there is no tangible evidence that he is wronging the representatives of the deceased, a receiver should be denied: *Comstock v. McDonald*, 113 Mich. 626.

A receiver for the property of a partnership cannot be appointed unless a partnership exists, though a mere denial of its existence will not prevent such appointment. If denied, the court will defer the appointment until the question is determined: *Goulding v. Bain*, 4 Sand. 716; *Kerr v. Potter*, 6 Gill, 404; *Guild v. Meyer*, 56 N. J. Eq. 183; *Hottenstein v. Conrad*, 9 Kan. 435; *Hobart v. Ballard*, 31 Iowa, 521; *Gregory v. Gregory*, 1 Sweeny, 613. A receiver will not be appointed, in a suit for the settlement of partnership accounts, if the defendant, having possession of the alleged partnership property, denies the existence of any partnership, is solvent, and is able to answer in damages: *Irwin v. Everson*, 95 Ala. 64.

In partnership cases, a receiver may be appointed, though a partner has assigned his interest to a third person: *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477; or where both partners have assigned their respective interests, and the assignees cannot agree: *Maynard v. Ralley*, 2 Nev. 313; or where each partner has assigned certain property of the firm to two different persons in trust for creditors: *Fox v. Curtis*, 176 Pa. St. 52; or a business is carried on only nominally: *Fischer v. Superior Court*, 98 Cal. 67; or where, after an accounting, it is desirable to collect from each partner the amount he is to pay, and apply the fund to pay the creditors: *Jordan v. Miller*, 75 Va. 442. The English partnership act of 1890, which enables a judg-

ment creditor of a partner to obtain a receiver of his interest in the partnership business, applies to a foreign firm having a branch house of business in England: *Brown v. Hutchinson*, [1895] 1 Q. B. 787.

On the other hand, in partnership cases, it is not proper to appoint a receiver where the allegations of the bill and its equities are fully denied by the answer: *Williamson v. Monroe*, 3 Cal. 383; *Rhodes v. Lee*, 32 Ga. 470; *Parkhurst v. Muir*, 7 N. J. Eq. 307; *Nutting v. Colt*, 7 N. J. Eq. 539; *Wales v. Dennis*, 9 Wash. 308; or where no statutory or equitable ground for a receiver is shown: *Mathews v. Williams*, 84 Ga. 536; or where the property has been sold under a chattel mortgage: *Davis v. Niswonger*, 145 Ind. 426; or where, upon a bill to wind up a firm, it is found that the assets thereof are in a foreign jurisdiction: *Harvey v. Varney*, 104 Mass. 436; or where the applicant has the firm property in his own possession and the other partner does not object: *Smith v. Lowe*, 1 Edw. Ch. 32; or where there is no danger that the firm property will be ultimately lost: *Wellman v. Harker*, 3 Or. 253; *Perrin v. Lepper*, 56 Mich. 351; or where general creditors insist on the appointment of a receiver because mortgagees are also secured by collaterals: *Burgwyn v. Bentley*, 90 Ga. 508. A court of equity will decree the dissolution of a partnership when it can no longer be carried on with comfort or advantage to all concerned. But where a valuable business has grown up by the labors and contributions of all, the court should not appoint a receiver, but should be careful to preserve the business, if possible, and to put all the parties upon a fair and equal footing in competing for it: *Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255.

Partition.—A receiver may be appointed in an action for the partition of real estate, upon a proper showing, particularly where the defendant is insolvent and unable to respond in damages, or in a case where the value of the property is being rapidly exhausted by an irresponsible cotenant, and the cotenants out of possession are threatened with an entire destruction of their estate: *Goodale v. Fifteenth District Court*, 56 Cal. 26, 32; *Duncan v. Campau*, 15 Mich. 415, 416. A court of equity may, in partition proceedings of numerous lots, if necessary, appoint a receiver to rent out the property in whole or in part, and pay the rent over to the cotenants according to their respective rights, or may order the lots to be held and enjoyed by one for a certain length of time, and then by the others successively: *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655. The appointment of a receiver is discretionary with the court in partition proceedings, and may be made to take charge of rents collected by an executor, though he is responsible and offers to indemnify the plaintiff against loss: *Rapp v. Reehling*, 122 Ind. 255. In a suit for the partition of personalty a receiver may be appointed to take charge of it, and, if it is found to be indivisible, to sell it and divide the proceeds among the persons entitled thereto: *Robinson v. Dickey*, 143 Ind. 205, 52 Am. St. Rep. 417. Where the other tenants not only deny the complainant's title, but have endeavored to en-

tangle the whole title, and are not disposed to account for the rents and profits, a receiver is proper: *Duncan v. Campau*, 15 Mich. 415; but if a tenant in possession does not dispute the title, or interfere with his cotenants, it is not proper to appoint a receiver, particularly where it is not averred that the defendant is insolvent: *Cassetty v. Capps*, 8 Tenn. Ch. 524. So where a tenant in possession is occupying under such circumstances that he is not liable to account, such mere occupancy affords no ground for the appointment of a receiver, pending an action for partition: *Varnum v. Leek*, 65 Iowa, 751. Neither should a receiver be appointed where the property has been left in the hands of one of the parties to manage in the common interest, if there is no allegation against him of insolvency: *Pierce v. Pierce*, 55 Mich. 629. Pending litigation for the partition of real estate, a receiver may properly be appointed to take charge of the property to rent it, to collect the rents, and to look after the interests of the parties, but no action of the receiver can affect the interests of minors without their consent or that of their guardians: *Ames v. Ames*, 148 Ill. 321. For further illustrations see note to *Cortleyen v. Hathaway*, 64 Am. Dec. 490.

Quo Warranto.—There is no authority for the appointment of a receiver in quo warranto proceedings, unless it can be found in express statutory provision: *Commonwealth v. Order of Vesta*, 156 Pa. St. 531, 534. In Pennsylvania, prior to April 26, 1893, the court of common pleas had no power to appoint a receiver on motion of the commonwealth in quo warranto proceedings against a corporation: *Fraternal Guardians' Assigned Estate*, 159 Pa. St. 603.

Railroad Property.—It is not unusual for courts of equity, without the aid of a statute, to put receivers in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. This is done at the instance of stockholders and mortgage bondholders, or other creditors, and others, to prevent a failure of justice; but the case ought to be one of urgency to justify a court in appointing a receiver to manage and operate the business of a railroad at all: *Meyer v. Johnston*, 53 Ala. 237; *Davis v. Gray*, 16 Wall. 203, 219; *Barton v. Barbour*, 104 U. S. 126; *Wilmer v. Atlanta etc. Ry. Co.*, 2 Woods, 409; *Allen v. Dallas etc. R. R. Co.*, 3 Woods, 316, 326; *Overton v. Memphis etc. R. R. Co.*, 10 Fed. Rep. 866; *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 18 Fed. Rep. 571; *Tysen v. Wabash Ry. Co.*, 8 Bliss. 247, 254.

The appointment in such cases is in the discretion of the court: *Meyer v. Johnston*, 53 Ala. 237; *Overton v. Memphis etc. R. R. Co.*, 10 Fed. Rep. 866; *Farmers' Loan etc. Co. v. Chicago etc. Ry. Co.*, 27 Fed. Rep. 146; *Smith v. Port Dover etc. Ry. Co.*, 12 Ont. App. 288; *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 18 Fed. Rep. 571; and this discretion is to be exercised sparingly, with great caution, and with reference to the special circumstances of each case as it arises: *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 376, 18

Fed. Rep. 571; *Overton v. Memphis etc. R. R. Co.*, 10 Fed. Rep. 866; *Kelly v. Trustee etc. R. R. Co.*, 58 Ala. 490. The appointment of a receiver simply to manage a railroad without any litigation concerning the contract rights of the parties is unauthorized: *American Loan etc. Co. v. Toledo etc. Ry. Co.*, 29 Fed. Rep. 416; *Overton v. Memphis etc. R. R. Co.*, 10 Fed. Rep. 866; and where a receiver is appointed for a railroad in two or more states, there should be but one set of receivers appointed. The road should be operated under one management, and as an entirety: *New York etc. R. R. Co. v. New York etc. R. R. Co.*, 58 Fed. Rep. 268, 279; *State v. Northern Cent. Ry. Co.*, 18 Md. 193, 215.

In a suit against a railroad company for the fraud and misconduct of its officials, a receiver may be appointed: *Forbes v. Memphis etc. R. R. Co.*, 2 Woods, 323, 331, 333. In case of default in the company's obligations the proper remedy is a receivership: *Phelps v. St. Catharines etc. Ry. Co.*, 19 Ont. 501. Mortgagees and bondholders have a right to the benefit of provisions in a deed of trust, and it is proper to appoint a receiver to enforce the terms of such a deed where the trustees fail to take possession as therein provided after default: *Wilmer v. Atlanta etc. Ry. Co.*, 2 Woods, 409. The mere fact that there has been a default in the payment of a mortgage debt is no ground for the appointment of a receiver, unless there is a stipulation in the mortgage that the mortgagee shall have the rents: *Tysen v. Wabash Ry. Co.*, 8 Biss. 247; *Allen v. Dallas etc. R. R. Co.*, 3 Woods, 316, 327; *Whitehead v. Wooten*, 43 Miss. 523; and a mere default in the payment of interest coupons secured by a railroad mortgage is no cause for a receiver: *American Loan etc. Co. v. Toledo etc. Ry. Co.*, 29 Fed. Rep. 416; but, if a railroad company, by a deed of trust, mortgages its income and profits, as well as its railroad and other property, to secure the payment of the principal and interest on its bonds, and authorizes the trustees, in default of the payment of the interest, to take possession of the mortgaged property, and apply the income to the payment of the interest, such default is a good ground for the appointment of a receiver at the instance of the trustees; and the appointment should not be denied in such a case on the ground that it is not shown that the company is insolvent; that the security is inadequate, that the mortgaged property is in jeopardy, or that the amount due on some of the bonds is in dispute: *Allen v. Dallas etc. R. R. Co.*, 3 Woods, 316; *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606.

The appointment of a receiver for railroad property, upon the foreclosure of a railway mortgage, is not a matter of strict right. "Such an application always calls for the exercise of judicial discretion; and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied": *Fosdick v. Schall*, 99 U. S. 235, 253, per Waite, C. J. But it is proper to appoint a receiver for the purpose of preserving the property from waste and diversion pending litigation, and to take charge of its income, applying the same to the payment of the company's secured debts. The rule in

such cases is, that a receiver will be granted in all cases where the income is required to meet the encumbrance, and is, at the present time, being so applied as not to be legally applicable to reduce the encumbrance: *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 94 Fed. Rep. 275, 281; *Union St. Ry. Co. v. Saginaw*, 115 Mich. 300; *Mercantile Trust Co. v. Missouri etc. Ry. Co.*, 36 Fed. Rep. 221; *Cheever v. Rutland etc. R. R. Co.*, 39 Vt. 653; *Wilmer v. Atlanta etc. Ry. Co.*, 2 Woods, 409, 415; *Benedict v. St. Joseph etc. R. R. Co.*, 19 Fed. Rep. 173; *Allen v. Dallas etc. R. R. Co.*, 3 Woods, 816; *Sacramento etc. R. R. Co. v. Superior Court*, 55 Cal. 453. After a decree and before sale, unless the interval is very brief, a receiver is proper where some bondholders are in possession to the exclusion of others: *Benedict v. St. Joseph etc. R. R. Co.*, 19 Fed. Rep. 173. If a judgment creditor has brought suit against a railroad company and obtained a receiver, after which the trustees of a mortgage bring a suit of foreclosure against the road, independent receivers should not be appointed in the latter suit, but the proper practice is to extend the receivership in the first suit to the second, and to consolidate the two suits: *Lloyd v. Chesapeake etc. R. R. Co.*, 65 Fed. Rep. 351; *Allan v. Manitoba Ry. Co.*, 10 Manitoba, 106. Compare *Evans v. Union Pac. Ry. Co.*, 58 Fed. Rep. 497.

A receiver will be appointed to take charge of railway property when necessary to secure the rights of the stockholders: *Stevens v. Davison*, 18 Gratt. 819, 98 Am. Dec. 692. Where a railroad is incorporated in two different states, and a receiver is appointed in one state, on the principle of comity, but the circumstances are such that the receivers cannot consistently and harmoniously represent all the interests of mortgage creditors and stockholders, a new receiver for that purpose should be appointed in a circuit court of the United States, the controversy being between citizens of different states: *Phinley v. Augusta etc. R. R. Co.*, 56 Fed. Rep. 273. A receiver may be appointed, at the instance of bondholders, to prevent a valuable land grant from lapsing: *Kennedy v. St. Paul etc. R. R. Co.*, 2 Dill. 448. Whenever it becomes necessary to compel obedience to its injunction or decree, a court may appoint a receiver to take control of the defendant's property, though it be that of a railroad company: *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 489; and in case of a dispute among several railroad companies, tenants in common of an easement, as to the right to run through a tunnel, a receiver may be appointed to protect their respective rights: *Delaware etc. R. R. Co. v. Erie Ry. Co.*, 21 N. J. Eq. 298. Compare *Midland Ry. Co. v. Ambergate etc. Ry. Co.*, 10 Hare, 359.

Although a receivership is sometimes based upon the mere insolvency of a railroad company, that fact alone may or may not be a ground for the appointment of a receiver for the company's property pending litigation over it. If the property is endangered by such insolvency, so as to jeopardize the interests of stockholders, secured creditors, and other interested parties, a receiver is proper, though the facts and circumstances should be set out. But where no such

condition is shown, insolvency, of itself, does not justify a receiver. The officers conducting a railroad business, to whom no fraud or fault is imputed, should not be displaced from the ad interim management, pending litigation, merely because the company is insolvent; but where the financial affairs of the company are in a chaotic condition, the court may, in its discretion, appoint a receiver and require the earnings of the road to be paid over to, and be disbursed by, him: *Merriam v. St. Louis etc. Ry. Co.*, 136 Mo. 145; *Meyer v. Johnston*, 53 Ala. 237; *Farmers' Loan etc. Co. v. Chicago etc. Ry. Co.*, 27 Fed. Rep. 146; *Newfoundland R. R. etc. Co. v. Schack*, 40 N. J. Eq. 222; *Pullan v. Cincinnati etc. R. R. Co.*, 4 Biss. 35; *Bill v. New Albany etc. R. R. Co.*, 2 Biss. 390; *Kelly v. Trustees etc. Cincinnati R. R. Co.*, 58 Ala. 489; *Cook v. Detroit etc. R. R. Co.*, 45 Mich. 453; *Bigelow v. Union Freight R. R. Co.*, 187 Mass. 478; *Pond v. Framingham etc. R. R. Co.*, 130 Mass. 194. Whenever the welfare of the various interests clearly requires it, the property of an insolvent railroad company may be put into the hands of a receiver, even before a default in the company's obligations, if such default is imminent and manifest, and the company is in peril of being broken up and of having its business destroyed: *Brassey v. New York etc. R. R. Co.*, 19 Fed. Rep. 668. If a railroad company is unable to pay its currently accruing interest, it is said to be actually, as well as technically, insolvent. And it has been held, in such a case, that its property should be put into the hands of a receiver, it being inadequate security for the mortgage debt: *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 94 Fed. Rep. 275. If allied railroad companies, together with the controlling company, have been put into the hands of receivers, by reason of the insolvency of the parent company, the allied companies must look out for themselves, and, if they desire it, have receivers of their own appointed: *Evans v. Union Pac. Ry. Co.*, 58 Fed. Rep. 497. If a railway corporation becomes insolvent, and a receivership is necessary for the preservation of its property and the distribution of its assets among its creditors, the directors, as trustees for the stockholders and creditors, and not the company itself, would seem to be the proper parties to institute the suit for the appointment of a receiver: *McIlhenny etc. Trust Co. v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705. The following cases show the facts and circumstances of that financial, chaotic condition of the affairs of railroad companies justifying the appointment of a receiver, to wit: *Brassey v. New York etc. R. R. Co.*, 19 Fed. Rep. 668; *Putnam v. Jacksonville etc. Ry. Co.*, 61 Fed. Rep. 440; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 94 Fed. Rep. 275; *Dow v. Memphis etc. R. R. Co.*, 20 Fed. Rep. 260; *Mercantile Trust Co. v. Missouri etc. Ry. Co.*, 36 Fed. Rep. 221; *Earle v. Seattle etc. Ry. Co.*, 56 Fed. Rep. 909, 914; *Farmers' Loan etc. Co. v. Winona etc. Ry. Co.*, 59 Fed. Rep. 957; *Kelly v. Trustees etc. Cincinnati R. R. Co.*, 58 Ala. 489; *Union St. Ry. Co. v. Saginaw*, 115 Mich. 300.

It is not proper to appoint a receiver of a railroad company, where there is an adequate remedy at law: *Rice v. St. Paul etc. R. R. Co.*,

24 Minn. 464; Boston etc. R. R. v. Boston etc. R. R., 65 N. H. 393; Overton v. Memphis etc. R. R. Co., 10 Fed. Rep. 866; or where the complainant's interests are protected by agreement: Baltimore etc. R. R. Co. v. Cannon, 72 Md. 493; or where there is a reasonable dispute as to whether the conditions of a mortgage have been violated, and the right to foreclose has been first determined: American Loan etc. Co. v. Toledo etc. Ry. Co., 29 Fed. Rep. 416; or where it is clear, in a case of foreclosure, that the mortgaged property will bring enough money to pay the debt, interest, and cost: Pullan v. Cincinnati etc. R. R. Co., 4 Bliss. 35; or where some of the persons holding mortgage liens on part of the property object: Merriam v. St. Louis etc. Ry. Co., 136 Mo. 145; or where there is a mere neglect to keep the property in repair, if it is shown that the company is responsible and answerable at law: Boston etc. R. R. v. Boston etc. R. R., 65 N. H. 393; or where the purpose is to recover money advanced for stock: Whelpley v. Erie Ry. Co., 6 Blatchf. 271; or where the appointment would impede public improvement: Central Trust Co. v. Wabash etc. Ry. Co., 26 Fed. Rep. 3, 5; or where the purpose is simply to change or improve the management of the property: American Loan etc. Co. v. Toledo etc. Ry. Co., 29 Fed. Rep. 416; or where minority stockholders sue for the wrongful dealings of directors, if the officers deny the charge and the plaintiffs do not prove it: Roman v. Woolfolk, 98 Ala. 219; or where notice ought to have been given, but was not, and not excused: Railway Co. v. Jewett, 37 Ohio St. 649; or where it is not necessary to protect some clear right of a suitor, which would otherwise be lost or greatly endangered: Overton v. Memphis etc. R. R. Co., 10 Fed. Rep. 866; or where the ground for the appointment is mere mismanagement of the property, or a disputed equitable claim: American Loan etc. Co. v. Toledo etc. Ry. Co., 29 Fed. Rep. 416; Overton v. Memphis etc. R. R. Co., 10 Fed. Rep. 866; or where such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration: Tysen v. Wabash Ry. Co., 8 Bliss. 247; or where a lessee has an intervening equity prior to the rights of bondholders, who apply for the appointment of a receiver, and the lessee is entitled to remain in possession under his lease: Louisville etc. R. R. Co. v. Eakins, 100 Ky. 745. A receiver for a street railway, appointed by a state court, will not be displaced by a federal court through the appointment of a receiver, unless the plaintiff shows, at least, a probable interest in the property: Central R. R. etc. Co. v. Farmers' Loan etc. Co., 56 Fed. Rep. 357; coupled with a well-grounded apprehension of immediate injury to such interest if the property is not taken in charge by the court: Lancaster v. Asheville St. Ry. Co., 90 Fed. Rep. 129. The consent of both parties does not authorize a receiver in an improper case, especially where the rights of third parties are concerned: Whelpley v. Erie Ry. Co., 6 Blatchf. 271. It is not proper to appoint a receiver, in a suit brought in New York, of railroad property in Florida. A federal court in one state cannot, by means of a receiver, reach property in another state: Kittel v.

Augusta etc. R. R. Co., 78 Fed. Rep. 855. A court has no power, on an ex parte application, to appoint a receiver of the assets of a defendant corporation: Young v. Rollins, 85 N. C. 485. In Illinois, a circuit court cannot, in vacation, appoint a receiver of a railroad corporation: Hammock v. Loan etc. Co., 105 U. S. 77; and the supreme court of the United States refused, in Pacific R. R. v. Ketchum, 95 U. S. 1, to appoint a receiver pending an appeal there, upon the showing made. A court, in appointing a receiver, may impose terms: Union Trust Co. v. Souther, 107 U. S. 591; and, where it has been imposed upon by making an appointment in a case where no necessity existed for it, the court may discharge or remove the receiver: Sage v. Memphis etc. R. R. Co., 125 U. S. 361. So if two receivers, originally appointed as the representative of different interests, become hostile, and dissensions and unnecessary expense follow, both may be removed and a single disinterested resident receiver appointed: Meler v. Kansas etc. Ry. Co., 5 Dill. 476. Compare the subdivision, "Disputed Title," supra.

Real Property.—A court of equity is reluctant to interfere with the legal title, and does so only in the case of fraud clearly proved and of imminent danger. It will not, therefore, appoint a receiver where the matter depends upon the legal title, even where the defendant is insolvent, unless strong grounds are shown and the rents and profits are in imminent danger: Thompson v. Diffenderfer, 1 Md. Ch. 489, 493; Furlong v. Edwards, 3 Md. 99; Vause v. Woods, 48 Miss. 120; Bryan v. Moring, 94 N. C. 694; Schlecht's Appeal, 60 Pa. St. 172; Williamson v. Wilson, 1 Bland, 418, 422; Klipp v. Hanna, 2 Bland, 26, 31; Speights v. Peters, 9 Gill, 479; Overton v. Memphis etc. R. R. Co., 10 Fed. Rep. 866; Schenck v. Peay, Woolw. 385; Rollins v. Henry, 77 N. C. 467; Lenox v. Notrebe, Hemp. 225, 228. A court will not ordinarily take the possession of property from a defendant having a clear legal title thereto, when the relief sought is founded on a disputed equity. But it may be done under proper circumstances. There is no absolute rule against it: Overton v. Memphis etc. R. R. Co., 10 Fed. Rep. 866; Peay v. Schenck, Woolw. 385. When the property is exposed to danger and to loss, and the party in possession has not a clear, legal right to the possession, it is the duty of a court to interpose, and appoint a receiver, until the rights of the contending parties can be adjudicated. And this has frequently been done: Hlawacek v. Bohman, 51 Wis. 92, 95; Pritchard v. Fleetwood, 1 Meriv. 54.

A widow, claiming dower in premises, may apply for a receiver: Chase's case, 1 Bland, 206, 17 Am. Dec. 277. See, also, Knighton v. Young, 22 Md. 359. A receiver is also authorized where the intent of a testator has been disregarded and the rents and profits are in peril: See subdivision, "Decedents' Property," supra; or where it is necessary to preserve the rights of annuitants: Probasco v. Probasco, 30 N. J. Eq. 108.

It is very questionable whether a receiver should be appointed for a homestead in any case; Callanan v. Shaw, 19 Iowa, 183; Nash v.

Meggett, 89 Wis. 486; Barfield v. Barfield, 72 Ga. 668; Landrum v. Chamberlin, 73 Ga. 727. In an action to recover the possession of real property to which the title is disputed and of which both parties claim to be owners in fee, a receiver will not be appointed to take possession of the property from the defendant, or to receive the rents and profits thereof: Sengfelder v. Hill, 16 Wash. 355, 58 Am. St. Rep. 36. A court will not appoint a receiver for real estate of which the defendant is in the possession and enjoyment, under a claim of absolute ownership, and at the instance of an adverse claimant, without a reasonable probability that the complainant will establish his right to the satisfaction of the court. He must also show that the property is in danger, and, without proof of both of these conditions, the insolvency of the defendant is immaterial: Ryder v. Bateman, 93 Fed. Rep. 16. So where a party has title and possession under a lease in writing, enjoying rights apparently legal, a receiver will not be appointed, unless under urgent and peculiar circumstances; that is, such circumstances of danger or probable loss must be shown by the plaintiff as will move the conscience of a chancellor to interfere: Chicago etc. Min. Co. v. United States etc. Co., 57 Pa. St. 83. Thus, a receiver may be appointed for the purpose of enforcing the proper repair of houses: In re Fowler, 16 Ch. Div. 723; or one may be appointed where the tenant holds over, is insolvent, and the plaintiff has no security for rents: Nesbitt v. Turrentine, 83 N. C. 585. An order appointing a receiver, and requiring a delivery of the demised premises to him, followed by such delivery, is a lawful eviction of the tenant: Mariner v. Chamberlain, 21 Wis. 251. See subdivisions, "Disputed Title" and "Ejectment," supra, and "Rents and Profits" and "Vendor and Purchaser," infra.

Rents and Profits.—A court is authorized to appoint a receiver to take charge of and to disburse the rents and profits of property, where they are not properly applied, and they are in danger of being lost through the insolvency of one in possession, or otherwise, though insolvency of itself is generally regarded, in such cases, as good ground for the appointment: Chase's case, 1 Bland, 206, 17 Am. Dec. 277; Bryan v. Moring, 94 N. C. 694; McNair v. McLeod, 96 N. C. 502; Cadogan v. Lyric Theater, [1894] 3 Ch. 338; Durant v. Crowell, 97 N. C. 367; Roberts v. Mullinder, 94 Ga. 493; but a receiver should not be appointed where the fact of insolvency is denied, and it appears that the one in possession is able to respond for the use of the property and to account for and pay over all rents and profits which he may have received: De Walt v. Kinard, 19 S. C. 286; Hamburgh Mfg. Co. v. Edsall, 7 N. J. Eq. 298; 8 N. J. Eq. 141. That a court of equity will not oust a tenant, by appointing a receiver, because he is a bad manager, or is vicious and disagreeable to his landlord, or is insolvent, see Blain v. Everitt, 36 Md. 73.

A receiver may be appointed to collect and hold rents and profits subject to the order or decree of the court: Kreling v. Kreling, 118 Cal. 421, 423. One may be appointed where a tenant for life is negli-

gent and fails to discharge the liabilities for which the rents are answerable: *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193; or in an action, aided by attachment, brought by a landlord for rent: *Smith v. Dayton*, 94 Iowa, 102, 108; or after judgment and appeal, when necessary to preserve the rents and profits: *Beard v. Arbuckle*, 19 W. Va. 145; *Corbin v. Thompson*, 141 Ind. 128; or where there is no personal estate to be first applied to debts, and the rents and profits of the realty must be responsible: *Jones v. Pugh*, 8 Ves. 71. In actions to enforce rent liens, where third persons claim perishable property attached, it is proper to appoint a receiver: *Smith v. Dayton*, 94 Iowa, 102. But no receiver is proper where the plaintiff is secure: *Clay v. Clay*, 86 Ga. 359; or where the purpose is merely to dispossess a defendant before trial and judgment, and upon an insufficient showing: *State v. District Court*, 13 Mont. 416; or where the purpose is to collect and preserve future rents to abide the result of an action involving mere legal, and not equitable, rights: *San Jose etc. Bank v. Bank of Madera*, 121 Cal. 543. Compare the subdivisions, "Disputed Title," "Insolvency," "Mortgaged Property," "Railroad Property," and "Real Property," *supra*.

Satisfaction of Judgment.—A court of equity has no jurisdiction to appoint a receiver merely because, under the circumstances of the case, it would be a more convenient mode of obtaining the satisfaction of a judgment than the usual modes of execution: *Harris v. Beauchamp*, [1894] 1 Q. B. 801. In the absence of any legal impediment to obtaining the execution of a judgment in the ordinary course of law by execution or attachment, a receiver should not be appointed, under the present English law, where there are no special circumstances showing it to be just or "convenient" that a receiver should be appointed: *Manchester etc. Banking Co. v. Parkinson*, 22 Q. B. D. 173. A court has no power to enforce the satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor: *Holmes v. Millage*, [1893] 1 Q. B. 551.

Specific Performance.—In an action for specific performance, the appointment of a receiver is authorized where there is danger of loss from waste, insolvency of the defendant, or other peril to the property: *Boehm v. Wood*, 2 Jac. & W. 236; *Dawson v. Yates*, 1 Beav. 301; *Hall v. Jenkinson*, 2 Ves. & B. 125; *McCaslin v. State*, 44 Ind. 151. Compare *Boehm v. Wood*, 1 Turn. & R. 343; *Walters v. Walters*, 132 Ill. 467. In such cases, a receiver may be appointed, on motion of the vendor, pending a reference of title: *Boehm v. Wood*, 2 Jac. & W. 236. In an action for the specific performance of a contract to assign a lease giving the right to sink or bore for oil, the appointment of a receiver to operate oil wells, pending the action, is authorized where the defendant, a nonresident without property in the state, except the machinery on the land, is operating the wells and selling the product: *Galloway v. Campbell*, 142 Ind. 324. And, in an action to compel a conveyance from the heirs of a deceased person, many of whom are minors, the court has

power to appoint a receiver in whom the legal title may be vested by the decree to make the conveyance, for the purpose of carrying the judgment into effect: *Scadden Flat etc. Min. Co. v. Scadden*, 121 Cal. 33, 41.

Supplementary Proceedings.—At any time after making an order requiring a judgment debtor or any other person to attend and be examined, or after issuing a warrant, as provided for in proceedings supplementary to execution, the judge before whom the order or warrant is returnable may make an order appointing a receiver of the judgment debtor's property: *Colton v. Bigelow*, 41 N. J. L. 266; *Tillotson v. Wolcott*, 48 N. Y. 188; *Second Ward Bank v. Upmann*, 12 Wis. 490; *In re Goudie*, [1896] 2 Q. B. 481. The appointment rests in the sound judicial discretion of the court: *Flint v. Webb*, 25 Minn. 263; *Dilling v. Foster*, 21 S. C. 334; *Bean v. Heron*, 65 Minn. 64; but it would be an oppressive abuse of discretion to appoint a receiver where it appears that mortgage security is ample to pay the creditor in full: *Bean v. Heron*, 65 Minn. 64. There can be but one appointment of a receiver in such a proceeding: *Sparks v. Davis*, 25 S. C. 381; and, when it appears that the judgment debtor has property liable to execution sufficient to satisfy the judgment, a receiver should be refused: *Second Ward Bank v. Upmann*, 12 Wis. 490. It is no bar to the appointment of a receiver that, pending supplementary proceedings, the judgment debtor has made a voluntary assignment of his property to an assignee of his own choosing: *Tomlinson etc. Mfg. Co. v. Shatto*, 34 Fed. Rep. 380; *Chautauque County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442. A receiver appointed in such proceedings cannot recover a debt not in existence at the time of his appointment: *Guild v. Meyer*, 56 N. J. Eq. 183.

In the earlier practice, the question of property or no property seems to have been disregarded in appointing receivers in supplementary proceedings, on the ground that, if there was no property to preserve, the plaintiff proceeded at the peril of costs, and that, if there was nothing for the receiver to take, the defendant could not be injured by the appointment: *Bloodgood v. Clark*, 4 Paige, 574, 577; *Fitzhugh v. Everingham*, 6 Paige, 29; *Browning v. Bettis*, 8 Paige, 508. But the practice has somewhat changed. While a debtor's mere denial of having property is no defense to an application for a receiver in supplementary proceedings: *Colton v. Bigelow*, 41 N. J. L. 266; *Bloodgood v. Clark*, 4 Paige, 574; *Browning v. Bettis*, 8 Paige, 508; *Fuller v. Taylor*, 6 N. J. Eq. 301; it is not proper to appoint a receiver where the court is satisfied that the defendant has no property: *Rodman v. Harvey*, 102 N. C. 1; *Williams v. Green*, 68 N. C. 183; or where he has none outside of that which is exempt: *Colton v. Bigelow*, 41 N. J. L. 266; *Adler v. Turnbull*, 57 N. J. L. 62; but to justify the appointment of a receiver it is not necessary for it to appear with certainty that the judgment debtor has property which should be applied on the judgment. A reasonable ground to believe that he has such property is enough: *Flint*

v. Zimmerman, 70 Minn. 346; Coates v. Wilkes, 92 N. C. 376; Journeay v. Brown, 28 N. J. L. 111. In cases where assets subject to the payment of debts are disclosed, a receiver of course is proper: McCullough v. Jones, 91 Ala. 186; Dilling v. Foster, 21 S. C. 334; Penn v. Whiteheads, 12 Gratt. 74. The appointment of a receiver of the property or interest of a judgment debtor is not "execution," and the executors of a deceased judgment creditor are, therefore, not entitled to the appointment of a receiver of the judgment debtor's property: Norburn v. Norburn, [1894] 1 Q. B. 448. See the extended note to Lathrop v. Clapp, 100 Am. Dec. 512, as to the appointment of receivers in proceedings supplemental to execution.

Taxes.—If a life tenant neglects or refuses to keep down the taxes, a receiver may be appointed: Murch v. Smith Mfg. Co., 47 N. J. Eq. 193; contra, Jenks v. Horton, 96 Mich. 13. So the failure of one in possession of land in litigation to pay the taxes accruing thereon is a sufficient ground for the appointment of a receiver: Johnson v. Tucker, 2 Tenn. Ch. 398; but courts of equity have no jurisdiction to appoint a receiver for the purpose of collecting taxes: Pierce County v. Merrill, 19 Wash. 175; Thompson v. Allen County, 115 U. S. 550; Meriwether v. Garrett, 102 U. S. 472, 501. Compare Garrett v. Memphis, 5 Fed. Rep. 860, 865.

Telegraph Companies.—There is no necessity for the appointment of a receiver for a telegraph company, where it has no outstanding debts except that of the complainant, with possibly a claim for advances on the part of a railroad company: Baltimore etc. Tel. Co. v. Interstate Tel. Co., 54 Fed. Rep. 50.

Trust Property.—To justify the appointment of a receiver for trust property there must be misconduct on the part of the trustee, or waste, mismanagement, misapplication, or improper disposition of the trust fund, or a denial or destruction of the trust estate by the trustee. Wherever the property, by any of these acts, becomes endangered or placed in a state of insecurity, which due care or conduct would have prevented, it is proper to appoint a receiver for the trust estate, to preserve it from loss, whatever the nature of the plaintiff's right, and whatever may be the nature of the property: Barkley v. Lord Reay, 2 Hare, 306, 308; Jones v. Dougherty, 10 Ga. 273, 287; McCandless v. Warner, 26 W. Va. 754; North Carolina R. R. Co. v. Wilson, 81 N. C. 223; Albright v. Albright, 91 N. C. 220; Ellett v. Newman, 92 N. C. 519; Robert v. Tift, 60 Ga. 566; Gunn v. Blair, 9 Wis. 352; In re Fowler, 16 Ch. Div. 723; Poythress v. Poythress, 16 Ga. 406; Chase's case, 1 Bland, 206, 17 Am. Dec. 277; Vose v. Reed, 1 Woods. 650; Du Val v. Marshall, 30 Ark. 230; Powell v. Quinn, 49 Ga. 523; Randle v. Carter, 62 Ala. 95; Leddell v. Starr, 19 N. J. Eq. 159; Calhoun v. King, 5 Ala. 523; Edie v. Applegate, 14 Iowa, 273; Beverly v. Brook, 4 Gratt. 187. A receiver is proper to prevent a transfer of property held in trust: Lutt v. Grimont, 17 Ill. App. 308, 312; to preserve a trust fund, pending distribution: Carson v. Combe, 86 Fed. Rep. 202; or to take charge of property

assigned for the benefit of creditors where there is danger of its loss or misappropriation: *Wagner v. Coen*, 41 W. Va. 351. The insolvency of a trustee is sometimes made a ground for the appointment of a receiver, but insolvency of itself does not necessarily justify such appointment, unless there is danger from that source to the trust fund: *Haggarty v. Pittman*, 1 Paige, 298, 19 Am. Dec. 434; *Jenkins v. Jenkins*, 1 Paige, 243; *Keyes v. Brush*, 2 Paige, 311; *Ex parte Walker*, 25 Ala. 81; *Bowling v. Scales*, 2 Tenn. Ch. 63; *Ladd v. Harvey*, 21 N. H. 514; *Hatcher v. Massey*, 66 Ga. 66. On the other hand, it is improper to appoint a receiver for trust property when there is no danger to it. Slight and trivial grounds will not be considered: *Vose v. Reed*, 1 Woods, 647; *Rogers v. Roas*, 4 Johns. Ch. 388, 8 Am. Dec. 575; *Orphan Asylum v. McCartee*, Hopk. Ch. 429; *Ogden v. Kip*, 6 Johns. Ch. 162; *Poythress v. Poythress*, 16 Ga. 406; *Wanneker v. Hitchcock*, 38 Fed. Rep. 383; *Jones v. McPhillips*, 77 Ala. 314. Even where a good case for a receiver is made, the appointment will be denied, when, if made, it would encourage a combination or "trust" in restraint of trade: *American etc. Mfg. Co. v. Klotz*, 44 Fed. Rep. 721; but see *Cameron v. Havemeyer*, 25 Abb. N. C. 438. Unlawful possession of property not included in a trust does not justify a receiver: *Curran v. Craig*, 22 Fed. Rep. 101; nor is one proper where it is not necessary to preserve the trust property from loss and injury: *Anderson v. Cecil*, 86 Md. 490. Compare the extended note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 488, for further illustrations.

Vendor and Purchaser.—The appointment of a receiver is proper where it is sought to enforce a vendor's lien, and there is danger of loss, from the purchaser's insolvency or otherwise: *Hughes v. Hatchett*, 55 Ala. 631; or where the vendor seeks a rescission and the purchaser's acts are liable to cause a loss to the plaintiff: *Cook v. Andrews*, [1897] 1 Ch. 266; or where it is sought to secure rents and profits in a suit to foreclose a title bond: *Caudle v. Moran*, 119 N. C. 432. For other illustrations, see the extended note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 488.

Water Companies—Waterworks.—A receiver may be appointed, at the instance of bondholders, over the property of a water and sewer company, even before maturity of the debt, if default is imminent and unavoidable, and it is necessary to prevent a destruction of its business, and protect its property against attachments and executions in favor of general creditors: *Thompson v. Natchez etc. Co.*, 68 Miss. 423. But a bill for a receiver to take charge of the property and affairs of a dissolved water company must have equity or the appointment will be refused: *Weatherly v. Capital City Water Co.*, 115 Ala. 156. And the mere insolvency of a corporation organized for the purpose of constructing and operating a waterworks plant does not always justify such an appointment. As said in *Trust & Deposit Co. v. Spartanburg Waterworks Co.*, 91 Fed. Rep. 324: "There are certain general principles of universal application, and certain settled rules which should govern in cases of this nature.

Among them are that courts of equity are reluctant to displace bona fide possessors from any of the just rights attaching to their title; that courts are not established for the carrying on of private enterprises; that it is not one of their proper functions to supply agencies for the conduct of a business for the profit of parties litigant; and that they have no magic touch whereby they can transmute insolvency into solvency, or render productive that which was unproductive. Power is given to them to appoint receivers, but it is a power to be sparingly exercised, and only in cases where the interests of justice imperatively demand it; for it is no light thing to wrest property from the hands of its owners. Mere insolvency, arising from no proved fault in the management of private corporations, is not a sufficient ground. There should be some evidence of waste, or mismanagement, or carelessness, or fraud, or extravagance, wantonness, or collusion; some ground to apprehend that the property will suffer deterioration or serious injury; something to show that there is danger of probable loss, or that some rights may be substantially impaired": Compare *Hawes v. Oakland*, 104 U. S. 450; *Los Angeles v. Los Angeles etc. Water Co.*, 124 Cal. 368; *Los Angeles etc. Water Co. v. Superior Court*, 124 Cal. 385.

HORST v. SILVERMAN.

[20 WASHINGTON, 233.]

TRIAL—EXAMINATION OF JURORS ON VOIR DIRE—CREDIT TO WITNESSES—RELIGIOUS FAITH.—It is not proper, on the voir dire examination of a juror, to ask him whether he would give as much credit to witnesses of the Jewish faith as he would to members of any other faith.

Samuel R. Stern, for the appellants.

Boney & Hoyt and W. H. Ludden, for the respondents.

233 PER CURIAM. Plaintiff's action was brought to recover damages for injuries sustained from falling through an unguarded trap-door in defendant's store, located in the city of Spokane. From a judgment in plaintiff's favor the defendants have appealed.

The principal claim urged is that the verdict is unsupported by the evidence, and that the plaintiff was guilty of negligence contributing to the injury complained of. There was competent evidence, much of which was received without objection, which went directly to support plaintiff's theory, and the question was peculiarly one to be submitted to the determination of a jury.

Another contention is, that the court erred in sustaining an objection to a question asked by appellant's counsel of juror Gildea on the voir dire. For the purpose of enabling counsel to intelligently exercise his right of peremptory challenge, it was proper enough to permit the question to be asked of the juror whether he entertained any prejudice against the people of the Jewish faith. This the court permitted, but the next ensuing question, viz., "Would the testimony of witnesses who professed that faith receive as much credit as members of any other faith?" was, we think, very properly ruled out on the authority of *State v. Holedger*, 15 Wash. 443.

The court did not err in refusing to discharge juror Williams after the trial had commenced, upon the claim that he had been guilty of falsehood and concealment in his voir dire examination. We are convinced that the juror answered frankly and concealed nothing that he was called upon to reveal, by any fair construction of the questions directed to him. We think the case was fairly tried, and the verdict justified by the evidence. The assignments of alleged error not specifically noticed are considered to be without merit, and the judgment is affirmed.

TRIAL—JURORS—BIAS.—Whenever a juror shows, upon his examination, that he himself fears that his deliberations cannot be impartial, or where he expresses a state of feeling from which it appears that his mind is in an improper condition, he will generally be excluded, but he should not be rejected for implied or presumed bias until that does appear: See monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 745, 746, on the rejection of a juror for bias.

BEACH v. BROWN.

[20 WASHINGTON, 206.]

HUSBAND AND WIFE—ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTIONS.—UNDER A STATUTE which permits a married woman to sue and be sued as if sole, abolishes all laws imposing civil disabilities upon her not existing against her husband, and which provides that, for any unjust usurpation of her rights, she may appeal, in her own name, to the courts for redress and protection. she may, in her own name, maintain an action for damages for the alienation of her husband's affections.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE AFTER DIVORCE.—The fact that a wife has obtained a divorce does not preclude her from maintaining an action for damages for the alienation of her husband's affections, particularly where the wrongful acts of which she complains created the necessity for, and caused, the action for divorce.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE AFTER DIVORCE—EVIDENCE.—If a wife obtains a divorce, and then brings an action for the alienation of her husband's affections, his letters to her during coverture, showing his affection for her, are admissible in evidence.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE—SELF-SERVING TESTIMONY OF DEFENDANT.—In an action by a wife for the alienation of her husband's affections, testimony as to the husband's avowed object in writing affectionate letters to her is inadmissible on the ground of being self-serving.

HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE—EVIDENCE OF AFFECTION—PRESUMPTION.—In an action by a wife for the alienation of her husband's affections, the law presumes that he had an affection for her from the fact that he lived and cohabited with her, and had children by her; and this presumption continues until it is overthrown by a fair preponderance of testimony to the contrary.

John E. Humphries, W. E. Humphrey, and E. P. Edsen, for the appellant.

Lindsay, King & Turner, for the respondent.

²⁰⁷ **DUNBAR, J.** This is an action by the respondent against the appellant for damages for alienating the affections of respondent's husband. A demurrer was interposed to the complaint, to the effect that it did not state facts sufficient to constitute a cause of action, which was overruled. A motion for a nonsuit was also made and overruled. Upon the trial of the cause a verdict was rendered in favor of the respondent, judgment was entered in accordance therewith, and an appeal was taken to this court.

It is the contention of the appellant, in the first instance, that this action cannot be maintained, for the reason that a married woman in the state of Washington cannot maintain a suit in her own name for tort without her husband joining her, where the damages secured would be community property. This statement assumes somewhat the legal questions at issue. But on the main proposition, as to whether a married woman can maintain this action for the loss of the consortium of her husband, the authorities are somewhat conflicting. In *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, a case which was strongly relied upon by the appellant, it was decided by a divided court that she could not, but we are not impressed with the reasoning upon which that decision was based. It is conceded that, at the common law, the husband might maintain an action for the alienation of the affections of a wife, but it is said that the ²⁰⁸ wife's right to the society of the husband is differ-

ent in degree and value, and, in a long opinion, the court undertakes to substantiate this proposition. The reasons given are too numerous to set forth in this opinion, but we think they are unsatisfactory and illogical. The decision is also based upon the fact that at the common law the wife had no property in the consortium of her husband, and that her position as a wife precluded her from bringing the action. An attempt is made in this case to distinguish the cases that hold that the wife at common law had a right to bring this action, but we think the attempt was unsuccessful; and there are other cases maintaining the same view. However, the case of *Williams v. Williams*, 20 Colo. 51, squarely decides the proposition the other way, and shows that the doctrine is really based upon the ancient idea of the comparative inferiority of the wife. The court in that case said: "Mr. Justice Blackstone, who wrote one hundred and fifty years ago, gave as a reason for denying the wife's right of action in cases of this kind the following: 'The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury': 3 Blackstone's Commentaries, 142. This language seems strange in the present age, however familiar it may have been during the last century."

And the court then quotes *Warren v. Warren*, 89 Mich. 127, where it is said: "The wife is entitled to the society, protection, and support of her husband as certainly, under the law, and by moral right, as he is to her society and services in his household."

Foot v. Card, 58 Conn. 1, 18 Am. St. Rep. 258, is also quoted, where the court said: "So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal ²⁶⁰ affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society. The husband owes to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her as property as is that of the husband to him. Her right being the same as his in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him."

This reasoning, it seems to us, is more in conformity with modern thought on the subject of the marital relations existing between husband and wife: See, also, *Bennett v. Bennett*, 116 N. Y. 584; *Van Arnam v. Ayers*, 67 Barb. 544; *Haynes v. Nowlin*, 129 Ind. 581, 28. Am. St. Rep. 213; *Lynch v. Knight*, 9 H. L. Cas. 577; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

But, however it may have been at the common law, the trend of judicial opinion in this country has been in favor of extending rights of this kind to the wife, and it seems to us that the right is placed beyond a peradventure by our own statutes. We do not think that the cases decided by this court, which are cited by the appellant, bear upon this question. The legislature of this state has, from time to time, plainly sought to remove disabilities of this character from married women, and section 1408 of 1 Hill's Code (Ballinger's Code, sec. 4502) provides that: "Every married person shall hereafter have the same right and liberty to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued, as if he or she were unmarried."

It would seem as if this statute was very nearly conclusive of this question, but, if not, section 1409 (Ballinger's Code, ²⁷⁰ sec. 4503) makes it absolutely so. That section provides that: "All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has"; and it will be observed that all the exception that there is to this sweeping law is made in a proviso to section 1409, to this effect: "Provided always, that nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law."

And an investigation of the statutes in relation to the rights of married women shows that in all cases where exceptions are intended they are provided in the statutes. These statutes also do away with the necessity which existed under the common law, as held by some of the courts where the right was sustained, that the action could only be maintained when the husband joined in it. But the action in this case was brought by the respondent after she had obtained a divorce from her husband, and it is therefore urged by the appellant that, if she

ever had the right to bring this action, it was lost when she sought and obtained a divorce; that all rights were settled by the decree of divorce; and cases from this court are cited to sustain that contention. But we do not think that the cases cited or the law bear upon this character of rights. It could not, in the very nature of things, have been contemplated in the divorce decree. It is a damage which is peculiar to the wife, which the husband, under no rule of right, could have any interest in; and it would be a harsh rule of law that, conceding that the wife had this right during coverture, would deprive her of the right when ²⁷¹ the wrongful acts of which she complains created the necessity for and caused the action for divorce. Of course, the damages could not be calculated after the time when the decree of divorce was obtained. Having, then, the right to maintain this action, and there being no community—the community having been destroyed by the decree of divorce—we need not concern ourselves about the proposition that the damages when secured will be community property. The judgment settles the question as to the ownership of the amount secured for damages. This answers the demurrer upon both grounds, viz., that the complaint did not state facts sufficient to constitute a cause of action, and that the husband was a necessary party plaintiff, and also the error alleged in overruling the motion for a nonsuit.

It is alleged that the court erred in admitting in evidence letters written by the husband, Beach, to the respondent during coverture, for the purpose of showing the affection of the husband toward the wife. We think, under the circumstances of this case, that the letters were admissible, and the testimony was as competent as any other testimony showing the relations between the husband and wife, and they certainly do not fall under the ban of the statute cited by the appellant.

It is also claimed that the court erred in excluding testimony of the witness Stull in relation to the object which the husband avowed that he had in writing the letters. We think this testimony was properly excluded, and that it falls under the head of self-serving testimony.

The appellant also objects to the following instruction given by the court: "The law presumes that a husband who lives with and cohabits with his wife, she bearing children, the issue of such cohabitation, that he has an affection for her; and this presumption continues until it is overthrown by a fair preponderance of the testimony to the contrary."

³⁷² We are not prepared to indorse the pessimistic view of the marriage relation contended for by the appellant, and we think the instruction was correct, and that there was no error in the modification by the court of the instructions requested by the appellant.

There being no prejudicial errors committed by the court, the judgment will be affirmed.

Anders, Gordon, and Reavis, JJ., concur.

HUSBAND AND WIFE—ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTIONS.—STATUTES placing a wife upon an equality with her husband with respect to the protection of her property and personal rights, and permitting her to sue, in her own name and right, for personal wrongs suffered by her, entitle her to maintain an action against a third person for the alienation of her husband's affections, and loss of his companionship and support: *Gernerd v. Gernerd*, 185 Pa. St. 233, 64 Am. St. Rep. 646, and note.

HUSBAND AND WIFE—ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTIONS—EVIDENCE.—In an action by a wife against a third person for the alienation of her husband's affections, anything which throws light upon the causes and motives which induced the husband's estrangement should, as a rule, be admitted as a part of the *res gestae*: See monographic note to *Clow v. Chapman*, 46 Am. St. Rep. 475, on a wife's action for the alienation of her husband's affections. Conversations between the husband and the defendant are admissible in evidence to explain the relation of the parties to the suit, and the motives which induced them to act: *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360.

COMMERCIAL ELECTRIC LIGHT AND POWER COMPANY v. TACOMA.

[20 WASHINGTON, 288.]

MUNICIPAL CORPORATIONS—LIABILITY OF, FOR UNAUTHORIZED ACT OF MAYOR—RATIFICATION.—If the mayor of a city tears down the electric wires of a private company, which are lawfully upon the city's poles, the city is answerable for the damages caused, after it has ratified his act.

MUNICIPAL CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACTS OF CITY OFFICERS.—The unauthorized acts of a city officer may be ratified otherwise than by a city ordinance. Ratification, in such cases, is a question of fact for the jury, and testimony as to any fact tending to prove it is admissible in evidence.

T. L. Stiles, for the appellant.

W. H. Pritchard and Walter M. Harvey, for the respondent.

²⁸⁹ DUNBAR, J. In 1896, the appellant was engaged in the electric lighting business in the city of Tacoma, and, by license from the city, had its wires strung on poles in the usual manner throughout the streets and alleys. The city was also engaged in the lighting business, and appellant, by virtue of a certain contract, had certain of its wires strung on poles which belonged to the city, at an annual rental. In July of the year, 1896, the mayor of the city of Tacoma got together a force of men from the city's electrical department, and some of the policemen of the city, and in the night-time caused all the wires of the appellant which were on the city's poles to be torn down and destroyed. This was done without previous express direction ²⁹⁰ or authority from the council. This action was brought against the city for the damages resulting from the tearing down and destruction of the wires of the appellant.

The complaint alleges the ratification of the action of the mayor by the city by the subsequent action of its officers. On the trial, plaintiff established its right to maintain its wires where they had been, by introducing the judgment-roll in a case wherein that question was determined (*Commercial Electric Light etc. Co. v. Tacoma*, 17 Wash. 661); showed the character and amount of damages which it had sustained, that the city was engaged in the same kind of business, and was contending with appellant for the custom of the consumers of electricity; and introduced some evidence concerning the ratification of the action of the mayor. The appellant then sought to show, by introducing in evidence the record of cause No. 15,335, which had been finally determined in this court (a cause which had been commenced by the city against appellant), that it had, immediately after the acts complained of, sought affirmatively to take advantage of the mayor's act of tearing down appellant's wires by appealing to the same court, in another department, to enjoin appellant from putting them up again, thus practically nullifying the injunction which appellant had already obtained earlier in the day. The injunction asked was obtained, and forbade appellant to fasten any wires to the poles belonging to the city of Tacoma; but the case was afterward determined against the city in this court. This testimony was objected to, on the ground that it did not tend to show ratification, and on the further ground that such actions were incapable of ratification by the defendant, the city of Tacoma. The objection was sustained, the court holding that the only way in which the city could have ratified these acts would have

been by an ordinance, if, indeed, ratification were possible at all.²⁰¹ The plaintiff also sought to prove by Judge Pritchard, who issued the temporary injunction and restraining order before referred to, that the city attorney and some members of the city council came to him after the injunction was issued asking for a modification of the order. This testimony was also objected to, and the objection sustained by the court. Upon the rejection of this testimony, the defendant asked for a nonsuit, which was granted, and the action was dismissed at plaintiff's cost. So that the question to be determined is, whether the city is responsible for the action of the mayor in committing the trespass alleged in the complaint, and, if so, whether it could ratify the actions of the mayor in any other way than by ordinance.

On the first proposition it was said in *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157, by Chief Justice Shaw, who rendered the opinion of the court: "That an action sounding in tort will lie against a corporation, though formerly doubted, seems now too well settled to be questioned: *Yarborough v. Bank of England*, 16 East, 6; *Smith v. Birmingham etc. Gas Light Co.*, 1 Ad. & E. 526. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations: *Clark v. Washington*, 12 Wheat. 40; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421."

And the court in that case laid down the general rule as follows: "As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation."

It was also held in that case that whether a particular act operating injuriously to an individual was authorized by²⁰² the city by any previous delegation of power, general or special, or by any subsequent adoption or ratification of the particular act, was a question of fact, to be left to the jury to be decided by all the evidence in the case. And so we think that the question of ratification here was a question of fact, which ought to have been submitted to the jury, especially under the circumstances of this case, where the pleadings show that the parties

were in competition with each other in furnishing light to the citizens of Tacoma.

Mr. Dillon, in discussing this question, after laying down the rule that, to create the liability, the act must be done within the scope of the corporate powers, and that, if the act complained of necessarily lies wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, says (Dillon on Municipal Corporations, sec. 968): "But if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it"; and in section 969a, continuing, says: "In the two preceding sections we have used the words '*ultra vires*' in the sense of meaning an act which, both intrinsically and in its external aspects, is, under all circumstances, wholly and necessarily beyond the possible scope of the chartered powers of the municipality."

So that, under this text, the action of the mayor in this respect does not fall within the definition of *ultra vires*. A case which seems to us squarely in point here, although its application is denied by the respondent, is that of *McGary v. Lafayette*, 12 Rob. (La.) 668. In that case, McGary had a building on what the mayor believed to be public land. He proceeded at the head of a force of laborers ²⁹³ and demolished a part of plaintiff's house, for the supposed reason that it was on public ground; and the city ratified the act by defending it. It was held that, although the acts of the mayor were done without any order from the town council, yet, by reason of its subsequent ratification, the town was liable. We do not think that, under any of the modern authorities, at least, the ratification need necessarily be made by ordinance, but that any acts which tend to show ratification on the part of the city may be submitted to the jury in proof of ratification. It would be difficult to lay down a universal rule in regard to the proof of ratification, for every case depends upon the circumstances surrounding it. In this case, for instance, the fact that the city was in competition with the plaintiff would justify a character of proof to prove ratification that might not be admissible in a different kind of case; and we think that any testimony tending to show the action of the city authorities in relation to this act of the mayor ought to be admitted for the purpose of de-

termining the fact whether such action was ratified by the city. The proofs offered were all competent for this purpose and should have been admitted.

The judgment will be reversed and the case remanded, with instructions to overrule the motion for a nonsuit and to admit the proofs offered by the appellant.

Gordon and Anders, JJ., concur.

MUNICIPAL CORPORATIONS—TORTS OF OFFICERS—LIABILITY—RATIFICATION.—A city is not ordinarily answerable for the torts of its officers, except where the acts have had the sanction, express or implied, of the municipal authorities, in which case the city is liable: *Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 158; note to *Huron Waterworks Co. v. Huron*, 58 Am. St. Rep. 835.

PHILLIPS v. REYNOLDS.

[20 WASHINGTON, 374.]

LANDLORD AND TENANT—OPTION TO EXTEND TERM OR TO PURCHASE IMPROVEMENTS.—If premises are leased for a term of years, with a provision in the lease that the lessee may make improvements on the property, and that, at the end of the term, the lessor will either "extend" the lease, or buy the improvements, the lessor cannot, upon the expiration of the term, defeat his obligation to renew the lease, or to buy the improvements, by extending the lease merely for one day. A reasonable construction is that the lessor should either buy the structures, or renew the lease for the original period, and he cannot, therefore, maintain an action to recover the possession.

LANDLORD AND TENANT.—AN EQUITABLE LIEN UPON LAND FOR IMPROVEMENTS thereon cannot be maintained unless they were made for the benefit of the land, and do benefit it. Hence, the rule does not apply to a case where it is agreed between the lessor and lessee that structures erected on the leased premises may be removed at the option of the lessee, and that they shall not be considered as attached to the land.

APPEAL—ASKING MORE FAVORABLE JUDGMENT.—A party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below.

U. D. Gnagey and J. M. Wiestling, for the appellant.

A. W. Buddress, for the respondent.

³⁷⁵ **DUNBAR, J.** This action was commenced in the superior court of Jefferson county by the appellant against the respondent, for the purpose of recovering the possession of cer-

tain premises situated in Port Townsend, Washington, and grows out of a lease of said premises by the appellant to the respondent's assignor. The appellant, on the twelfth day of September, 1885, leased to Andrew Weymouth, for a term of twelve years, the premises in question. The lease provided that the parties of the second part should at any time during the said term of twelve years erect, or cause to be erected, on said premises, any structure or structures which the lessee might see fit to make, provided that the entire cost of the structure, and the repairs thereof, should be at the sole expense of the lessee; that said structure should not be considered attached to the land, or part of the real estate, but could be sold by the lessee and removed by him at any time. The further provision appears in the lease: "And the said parties of the first part, for themselves, their heirs, executors, administrators, and assigns, further covenant, promise, and agree to and with the said party of the second part, his heirs, executors, administrators, or ³⁷⁶ assigns, in consideration of the premises, that at the expiration of said term of twelve years they will buy all such buildings placed thereon, or extend this lease."

Other portions of the lease provide for arbitration in relation to the value of the leasehold in case the lease is extended and the parties to the lease are not able to agree upon such value. Another provision is to the following effect: "It is further mutually agreed that if said lease is not extended, but the parties of the first part, or their legal representatives, buy such buildings, and the parties or their legal representatives cannot agree on a fair valuation for the same, then each shall choose a disinterested person, and the valuation they agree on shall be paid by the one party and accepted by the other. If such two persons cannot agree, they (said two) shall call on a third disinterested person, and the valuation which any two of the three place thereon shall be binding and paid and accepted by the parties hereto, or their representatives."

There are many other provisions of the lease, as it is very long and somewhat involved, but we have set forth above all that is necessary for the determination of this case. At the expiration of the term of twelve years the lessor, appellant here, extended the lease for one day, and, after waiting about fifty days and the respondent not having removed the buildings, commenced this suit for possession. The respondent interposed a demurrer, which was overruled, and then answered, setting up three defenses. We need deal with but the second defense, which sets

up the lease and the several assignments or transfers by which he succeeded to the rights of the lessee Andrew Weymouth, the respondent in this case being an assignee of said Weymouth. The appellant demurred to this defense. The court overruled the demurrer, and, the appellant refusing to reply to said defense, the court, on motion of the respondent, granted judgment on the pleadings.

³⁷⁷ A mere statement of the case would seem to be sufficient to justify the action of the trial judge, in the opinion of an appellate court, for it would be worse than farcical to hold that within the contemplation of the parties to this lease an extension of one day would meet its requirements. We have examined the authorities cited by the appellant, both in his original and reply briefs, and none of them would sustain an action of this kind. It is somewhat difficult to construe this lease, but we think that the evident intention was that the lessor should either buy the structures or renew the lease for the period of twelve years, and that the word "extension" was used with that meaning. To give the lease the construction claimed for it by the appellant would, indeed, make the contract very one-sided. It was the evident intention that the lessee should have an option to sell the property or to have a renewal of the lease. All the different provisions of the lease, which are too numerous to set forth, convince us that this was the intention.

It is urged by the respondent that the improvements constitute an equitable lien upon the land, and he asks this court to send the case back to the lower court, with instructions to decree a lien for the value of the improvements, which was set up by the answer, and order a sale of the property for the purpose of collecting the judgment. But we are inclined to think that, under the terms and conditions of this lease, the doctrine of an equitable lien would not be applicable. That doctrine must rest, if sustained at all, upon the theory that the improvements are made for the benefit of the land, and do benefit it. But the conditions of this lease being to the effect that the structures might be removed at the option of the lessee, and that they should not be considered as attached to the land, it seems to us that the case would be taken out of that rule. In any event, this was an action at law and the judgment of the lower court was not appealed from by the respondent. He ³⁷⁸ cannot, therefore, ask at the hands of this court a judgment which would be more in his favor than the judgment which he obtained below.

The judgment of the lower court will be affirmed.

Scott, C. J., and Anders, Gordon, and Reavis, JJ., concur.

LANDLORD AND TENANT—HOLDING OVER—CONDITIONS IMPLIED.—A tenant from year to year, holding over without any new stipulations between the parties, impliedly holds subject to all the covenants in his expired contract or lease: *Vrooman v. McKaig*, 4 Md. 450, 59 Am. Dec. 85; *Crommelin v. Thieess*, 31 Ala. 412, 70 Am. Dec. 499.

COMPENSATION FOR IMPROVEMENTS will not be allowed unless they are permanent and beneficial: Note to *Vaughan v. Cravens*, 1 Head, 108, 78 Am. Dec. 164.

SMITH v. ORMSBY.

[20 WASHINGTON, 396.]

MANDAMUS—ISSUANCE OF WRIT—COMPLAINT AND SUMMONS NOT NECESSARY.—Under a statute providing that a writ of mandate "must be issued upon affidavit on the application of the party beneficially interested," a complaint and summons are not required, as in ordinary civil actions.

MANDAMUS TO COMPEL TOWN TO ISSUE WARRANT IN PAYMENT OF JUDGMENT.—IT IS NO DEFENSE, to a writ of mandate to compel a town to issue its warrant in payment of a judgment, that the contract upon which the judgment was obtained was void because, at the time of entering into it, the town was beyond the constitutional limit of indebtedness.

MUNICIPAL CORPORATIONS—HOW TO ENFORCE PAYMENT OF JUDGMENT AGAINST.—Under the statute of Washington which relates to the enforcement of judgments against public corporations, and which provides that, in order to obtain payment, a certified transcript of the docket of such a judgment, including a memorandum of acknowledgment of satisfaction, must be presented to the officer authorized to draw orders on the treasury, who shall thereupon draw a warrant in favor of the judgment creditor, it is sufficient, to obtain the payment of a judgment against a town, to present to the mayor a transcript of the execution docket, and to the town clerk a transcript of the judgment itself, where each transcript shows a satisfaction, and to demand of them the issuance of a warrant.

J. Henry Smith, for the appellants.

Chambers & Smith, for the respondent.

³⁹⁶ GORDON, J. This proceeding was initiated in the superior court of Skagit county, and the object is to compel appellants, as mayor and clerk, respectively, of the town of Woolley, a municipal corporation of the fourth ³⁹⁷ class in said county,

to issue a warrant of said town in payment of a judgment which one John A. Moore, respondent's assignor, had previously recovered against the town. Upon the return of an order to show cause, the appellants appeared and moved to quash the proceedings, which motion was denied, and thereafter their demurrer was overruled, and, upon issue joined by an answer subsequently filed, the court proceeded to hear and determine the cause upon its merits, rendering judgment in respondent's favor. The appeal is from that judgment.

The first assignment of error is that the court was without jurisdiction to issue the order to show cause, because at the time the order was issued no action had been commenced; and, in support of this assignment, counsel for appellants cite and rely upon section 4869 of Ballinger's Code (Laws 1895, sec. 1, p. 170), which provides that "civil actions . . . shall be commenced by the service of a summons . . . or by filing a complaint." But we think that section does not apply, for the reason that this was a special proceeding instituted under authority of chapter 65 of the Session Laws of 1895, entitled: "An act regulating special proceedings of a civil nature." Section 17 of that chapter (Laws 1895, p. 117; Ballinger's Code, sec. 5756), relating to the issuance of the writ of mandate, provides that it "must be issued upon affidavit on the application of the party beneficially interested." That chapter does not contemplate that a complaint shall be filed in a proceeding of this character, nor that a summons shall issue as is required in ordinary civil actions. This objection therefore was properly overruled.

There are other formal assignments, relating to questions of procedure, not affecting the merits and which do not require extended consideration. We think the court proceeded within its jurisdiction in passing to a consideration of the merits of the cause.

³⁰⁸ The answer affirmatively set up that the contract, upon which the judgment was obtained, was void because, at the time of entering into it, the town was beyond the constitutional limit of indebtedness. To this there was no reply, and that part of the answer pertaining to it must be considered as equivalent to a finding of the court. But it remains to be determined whether it can avail the appellants in the present proceeding. We think the question we are now considering was squarely determined in the case of *State v. Gloyd*, 14 Wash. 5. The application in that case was for a writ of mandate to com-

pel the auditor of Pierce county to pay a judgment previously obtained by the relator therein. The answer contained an allegation that the indebtedness evidenced by the judgment had been incurred at a time when the county was beyond its constitutional limit of indebtedness. The lower court sustained a demurrer thereto, and we upheld the ruling upon the ground that "a judgment bars not only every defense that was as a matter of fact raised, but every defense that might have been raised." It follows, in consequence of that decision, that the attempted defense contained in the present answer is insufficient in law.

It was established at the trial that a transcript of the execution docket showing that the judgment had been satisfied as required by subdivision 3 of section 674 of 2 Hill's Code (Ballinger's Code, sec. 5676) had been presented to the mayor, and that a transcript of the judgment itself, which also showed a satisfaction, had been presented to the appellant clerk, and that a demand for the issuance of the warrant was duly made upon them prior to the commencement of the present proceeding. This was sufficient: 2 Hill's Code, sec. 674, subd. 3; Ballinger's Code, sec. 5676; *Lorence v. Bean*, 18 Wash. 36.

³⁹⁹ We think the lower court reached a just conclusion, and its order and judgment is affirmed.

Dunbar and Anders, JJ., concur.

MANDAMUS—ISSUANCE OF PLEADING.—*Mandamus* is in the nature of a civil action and is commenced by summons, and the pleadings and the practice are the same as are prescribed for the conducting of civil actions: *Bear v. Commissioners*, 124 N. C. 204, 70 Am. St. Rep. 586; *Barnes v. Glide*, 117 Cal. 1, 59 Am. St. Rep. 153; monographic note to *Dane v. Derby*, 89 Am. Dec. 741, on the law of *mandamus*, discussing the practice.

MANDAMUS TO PAY JUDGMENT.—A MUNICIPAL CORPORATION may be compelled, by *mandamus*, to pay a judgment rendered against it, there being no other adequate remedy, as an execution cannot be levied upon its property: *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530.

JUDGMENT AGAINST MUNICIPALITY FOR FORBIDDEN INDEBTEDNESS.—Under constitutional and statutory provisions limiting the amount of indebtedness which may be incurred by a municipal corporation, a difference of opinion has resulted respecting the right of a municipality to resist the enforcement of a judgment on the ground that the indebtedness out of which it grew was contracted in defiance of the constitutional or statutory inhibition. The principal case and *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224, insist, and we think correctly, that the judgment conclusively establishes the validity of the indebtedness upon which the recovery is founded. Other decisions maintain that the judgment may be collaterally avoided by proving the nature

of the cause of action out of which it grew; that it partakes of the character of such cause of action, and hence that its payment may be resisted: *Grand Island etc. Co. v. Baker*, 6 Wyo. 369, 71 Am. St. Rep. 926.

CUNNINGHAM v. SPOKANE HYDRAULIC MINING Co.

[20 WASHINGTON, 450.]

JURISDICTION—SERVICE.—It is the fact of service which gives a court jurisdiction, not the proof of service.

JUDGMENTS—FOREIGN—ACTION ON—JURISDICTION.—THE JUDGMENT-ROLL itself must affirmatively show jurisdiction where an action is brought on a foreign judgment.

JUDGMENT OF SISTER STATE—ACTION ON—ADMISSIBILITY OF AMENDED JUDGMENT-ROLL.—If the defendant does not appear, and judgment is taken against him by default, but the return does not show the necessary jurisdictional fact of service, though the proper party was in fact served, the return may be amended, after the entry of judgment, to show such fact, and without personal notice to the defendant of such proposed amendment, where the statute does not require it; and the judgment-roll, after such amendment, is admissible in evidence in an action on the judgment brought in another state.

W. B. Heyburn, E. M. Heyburn, and L. A. Doherty, for the appellant.

Stephens & Bunn, for the respondent.

⁴⁵⁰ **DUNBAR, J.** This was an action by the appellant against the respondent on a judgment obtained in the state of Idaho. The respondent moves to dismiss this appeal for the following reasons: 1. Because no bill of exceptions or statement of facts has been settled or certified as provided by law, or at all; 2. Because the alleged notice of application to settle bill of exceptions or statement of facts is wholly insufficient; 3. Because the certificate of the trial judge is wholly insufficient, and not such a certificate as is required by law, or any certificate whatever. There seems to be no merit in the first two objections, and the third is not tenable under the law of 1893. Motion denied.

The case was before this court formerly, and is reported in 18 Wash. 524, where a statement of the ⁴⁵¹ case at length is given. In that case, judgment was rendered in favor of the plaintiff, who is appellant here, but error was alleged in admitting the record of the foreign judgment, which did not show

service of process on the agent of the corporation or an appearance by the defendant against whom suit was brought. The judgment was reversed by this court, and, among other things, it was said: "Respondent tendered in evidence on the trial in the superior court what purported to be a copy of the designation of Jesse Coulter, as agent for the defendant corporation under the above statute, certified as of record in the district court, where the purported judgment was rendered, but not a part of the proceedings in the cause. The designation of agent so certified was received by the superior court over the objection of defendant. We do not think this certificate was a part of the record of the judgment, or of the record of the court in which the judgment was rendered. The judgment-roll itself must affirmatively show jurisdiction in this class of cases."

Subsequent to the reversal of that judgment an amendment to the return to correspond with the facts was allowed by the district court in Idaho, showing that the person served was the agent of the defendant. That proof was offered in the last trial of the cause in the superior court of this state, but it was held that it was not competent, because the record did not affirmatively show that the court had jurisdiction to amend the return; in other words, that it was not shown that personal service of the notice to amend the return was made. It is conceded that notice was given to the company in the state of Washington, so that they had notice in fact. Under the statutes of Idaho, it is not necessary to give personal notice of a motion of this kind in a case where the defendants have not appeared, but where judgment has been taken by default. But it is objected by the respondent, and is a general rule, no doubt, that, before a statute of a foreign state can be invoked, it must ⁴⁵² be pleaded; but in this case, it seems to us, this objection is without merit, for there was no opportunity to plead the statute after the necessity existed for amending the return. No pleadings are required in a motion of this kind. There was no way by which the statute could have been pleaded. The return in this instance shows that the party served was the agent of the company, and that was the fact which this court held that it was necessary to show. It then, in effect, became the law in this case, as announced by this court, that that fact must be shown by the return. It is elementary that a return can be made by an officer to conform to the facts. That was all that was done here. It cannot be said that the judgment of the Idaho court was void for want of jurisdiction, and that no

judgment in this state could be based upon it, because of the fact that the return showing the jurisdiction was not made until after the judgment was entered. The jurisdictional fact existed that the proper party had been served, and the announcement of that fact was not the essential thing in question. As was said by the supreme court of California in *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145—where a summons had been properly served, but the proof of service was defective, and the court, after judgment, allowed an amended affidavit of service to be filed nunc pro tunc as of the date of the judgment—quoting *Pico v. Sunol*, 6 Cal. 295: "Jurisdiction of the person of defendant is acquired by the service of process, and dates from such service, and not from the return." And *Drake v. Duvenick*, 45 Cal. 463, where it was said: "The fact of service was material, and from the time service was made the court was deemed to have acquired jurisdiction. The return of service might be formal or informal, perfect or imperfect, still, if service were in fact made, the court acquired jurisdiction of the person of the defendant." And *Estate of Newman*, 75 Cal. 220, 7 Am. ⁴⁵³ St. Rep. 146, where it was said: "It is the fact of service which gives the court jurisdiction, not the proof of service." Also, *Freeman on Judgments*, fourth edition, section 89b, where that author says: "If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted, or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid." And the note commenting upon *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, where it is said:

"To support judgments entered upon insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based upon such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not, and never were, void."

The last cited case (*Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52), which holds to the contrary, is cited by the court in *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, but in commenting upon it the court holds that it is not in accordance with the weight of authority. In this case the court certified

that it appeared to it that due notice of plaintiff's motion to amend had been given. We think it would be carrying the rule too far to reject the record in this case as presented by the appellant. The judgment will be reversed, and the cause remanded, with instructions to the lower court to overrule the objections to the admission of the testimony offered.

Scott, C. J., and Gordon, Reavis, and Anders, JJ., concur.

JURISDICTION IS ACQUIRED BY THE FACT OF SERVICE of process, and not from proof of it: *Burr v. Seymour*, 43 Minn. 401, 19 Am. St. Rep. 245.

JUDGMENT OF SISTER STATE—AMENDMENT—PLEADING. In suing upon the judgment of a court of another state it is not necessary to allege the jurisdictional facts. The presumption is, that the court had jurisdiction, and the judgment is *prima facie* valid: *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857; notes to *Fisher v. Fielding*, 52 Am. St. Rep. 281; *Dunstan v. Higgins*, 34 Am. St. Rep. 434. If the judgment was amended after its entry, it is sufficient to aver that the judgment was entered in a court designated, and that it was afterward duly amended: *Kunze v. Kunze*, 94 Wis. 54, 59 Am. St. Rep. 857.

EVIDENCE—THE JUDGMENT-ROLL OF ANOTHER STATE COURT, or an authenticated copy of it, is evidence of all that it properly contains, including the judgment; and is at least *prima facie* evidence that the judgment was properly rendered and entered so as to have effect: *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514.

FRANKENTHAL v. SOLOMONSON.

[20 WASHINGTON, 460.]

EXECUTION—SUPPLEMENTARY PROCEEDINGS AGAINST WIFE—EXAMINATION WITHOUT HUSBAND'S CONSENT.—A statute providing that a wife shall not be examined for or against her husband without his consent does not shield the wife of a judgment debtor in proceedings supplementary to execution, brought against her to discover whether she has property belonging to him in her possession, and she may therefore be examined therein without his consent.

Stoll & Macdonald, for the appellants.

Adolph Munter, for the respondent.

400 **ANDERS, J.** On June 21, 1897, the plaintiffs and appellants herein recovered a judgment in the superior court of Spokane county against one Sol. Solomonson for the sum of thirteen hundred and fifteen dollars and forty-five cents and costs. Execution was issued thereon, placed in the hands of the sheriff of the county, and by him returned wholly unsatis-

fied. Thereafter, the plaintiffs instituted this proceeding against Sarah Solomonson, wife of the said judgment debtor, under an act of the legislature approved March 15, 1893, entitled, "An act relating to proceedings supplemental to execution": Laws 1893, p. 435. Section 3 of that act (Ballinger's Code, sec. 5314) provides that: "Upon proof by affidavit or otherwise, to the satisfaction of the judge, that execution has been issued as prescribed ⁴⁶¹ by section 1 of this act, and also that any person or corporation has personal property of the judgment debtor of the value of twenty-five dollars or over, or is indebted to him in said amount, the judge may make an order requiring such person or corporation, or an officer thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

In accordance with this section, an affidavit was filed on behalf of the plaintiffs setting forth the rendition of the judgment against said Sol. Solomonson, the issuance and return of the execution, and that the defendant Sarah Solomonson had in her possession or under her control personal property, of the value of twenty-five dollars and more, and other property, all of which is the separate property of said Sol. Solomonson, and is held in the possession and under the control of said Sarah Solomonson for the purpose of preventing the collection and satisfaction of said judgment and execution. On motion of plaintiffs, the court issued an order directing the said Sarah Solomonson to appear before the court at a time and place designated, then and there to be examined touching what property, if any, she had or controlled and which was the separate property of said Sol. Solomonson, or in which he had some separate interest. She appeared at the time and place designated, and, the matter coming on to be heard, the said Sol. Solomonson objected to her being examined, upon the ground that a wife may not be examined for or against her husband without his consent. The consideration of this objection was taken under advisement by the court, and thereafter sustained, and judgment was entered dismissing the proceedings. To these rulings of the court the plaintiffs duly excepted, and the cause is now here upon appeal; and the only question to be determined is whether the court erred in sustaining the objection and dismissing the proceeding.

⁴⁶² It is claimed by the respondent that the action of the court was fully justified by section 1649 of the Code of Procedure (2 Hill's Code; Ballinger's Code, sec. 5994), which reads as follows: "A husband shall not be examined for or against his

wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either, during marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during marriage."

It is insisted by the learned counsel for the respondent that this law is based upon higher ground than that invoked by appellants, namely, that of preventing the suppression of truth or the failure of justice in particular cases. And, as an expression of his position, counsel cites us to the declarations of Chancellor Kent and of Lord Coke. "The husband and wife," says Chancellor Kent, "cannot be witnesses for or against each other. This is a settled principle of law and equity, and it is founded as well on the interest of the parties being the same, as on public policy. The foundations of society would be shaken, according to the strong language in one of the cases": 2 Kent's Commentaries, 178, 179. And Lord Coke says: "It has been resolved that a wife cannot be produced against her husband, as it may be the means of implacable discord and dissension between them and the means of great inconvenience": Coke on Littleton, 6b. It must be borne in mind, however, that both Chancellor Kent and Lord Coke were speaking of the rule at common law. The rule that excluded husband and wife from testifying for or against each other was adopted at a very early day in England, and at a time when husband and wife were in law one person, and when no party to an action was a competent witness because of his interest therein. But this rule of common law has been changed by legislation in ⁴⁶³ this and almost every other state, and the interest of a party in an action is no longer a disqualification as a witness. And our law-makers manifestly concluded that public policy should not alone prevent a husband or wife from testifying for or against each other. Under the statute above quoted, either may be a witness for or against the other by the consent of that other; and it can hardly be said that that is public policy, as the term is ordinarily understood, and therefore beneficial to the public at large, which depends exclusively upon the will or caprice of a particular individual. Counsel for the respondent also cites the following cases as sustaining his contention that the defendant, Mrs. Solomonson, was not a competent witness in this proceeding: Berles v. Adsit, 102 Mich. 495; De Farges v. Ryland, 87 Va. 404, 24 Am. St. Rep. 659; Niland v. Kalish, 37 Neb. 47; Wolford v.

Farnham, 44 Minn. 159; Macondray v. Wardle, 26 Barb. 612; White v. Stafford, 38 Barb. 419.

But an examination of these authorities will disclose that they are cases in which both the husband and wife were parties, and in which the plaintiff called either the one or the other as a witness; and neither of the cases involved a proceeding in any wise like the present, except the Michigan case, in which a wife was cited as garnishee in an action pending against her husband, and in which it was held that she could not be compelled to testify over her husband's objection. The rule contended for by respondent here was properly applied in those cases. But this is an entirely different proceeding. Here the husband is not a party, and, we think it may be said, is not interested in such a sense as to preclude the examination of the wife as a witness for the plaintiff. Mr. Freeman, speaking of supplemental proceedings, says that a defendant is not entitled to notice of a proceeding of this character against ⁴⁰⁴ his creditor; nor is he a party thereto in such a sense as entitles him to interfere therewith, or to conduct the defense of the party cited: 2 Freeman on Executions, 2d ed., sec. 411. See, also, Gibson v. Haggerty, 37 N. Y. 555, 97 Am. Dec. 752, and Jones v. Roberts, 60 N. H. 216. In the case last cited, it was held that a wife may be charged as trustee of her husband, and that the latter has no such necessary interest in the controversy between the plaintiff and the trustee as to make him the adverse party within the meaning of the statute. It appears that in some jurisdictions a writ of garnishment may be issued either before or after judgment, and, in considering the nature of such proceeding, Mr. Shinn observes that: "It may be stated as a rule that, in states where garnishment is not issued until after the creditor obtains judgment against his debtor, then the proceeding by garnishment against a person indebted to the judgment debtor is a new suit to which the creditor is plaintiff and the garnishee the defendant, brought into court by the process. It is governed by the general rules applicable to other suits, and to this suit a judgment debtor is a stranger": 2 Shinn on Attachment, sec. 469.

While in this state a proceeding after judgment is not denominated a garnishment, the principle involved is the same; and it would appear from the quotation from this learned author and the authorities therein referred to that the judgment debtor is a mere stranger to this proceeding against his wife. It follows, therefore, that, whatever the testimony of

Mrs. Solomonson might have been, it would have been neither for or against her husband, but for or against herself. If the husband had been called as a witness by the plaintiff, a different question would have been presented. In a proceeding like this, the supreme court of Wisconsin, in *In re O'Brien*, 24 Wis. 517, decided that the judgment debtor's wife may be required to disclose whether she has property of her husband's ⁴⁰⁵ under her control, and may be attached as for a contempt for refusing to answer. At that time the statute of Wisconsin, like ours, permitted parties other than the judgment debtor to be examined in supplementary proceedings. The law was subsequently changed so as to restrict the proceeding to the judgment debtor alone; and the supreme court of the state, in *Blabon v. Gilchrist*, 67 Wis. 38, held that, under the new law, the husband was not a competent witness against the wife, who was the judgment debtor. There is nothing in this latter case inconsistent with the former. In New York, it was held, at a special term of the supreme court, that the wife of a judgment debtor may be examined under section 294 of the code, which authorizes the examination of third persons alleged to have property belonging to the judgment debtor: *Lockwood v. Worstell*, 15 Abb. Pr. 430, note. The same doctrine was announced in *Thompson v. Silvers*, 59 Iowa, 670, by the supreme court of Iowa, and is approved by Mr. Waples in his work on Attachment and Garnishment, second edition, sections 949, 950: See, also, 2 Wade on Attachment, sec. 350; Rood on Garnishment, sec. 41.

It seems to us that this rule is both reasonable and just, and not inconsistent with our statute. Any other rule would permit a debtor to put all of his personal property in the hands of his wife, and thereby relieve himself from the payment of his honest debts, though abundantly able to pay them.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Scott, C. J., and Gordon, Dunbar, and Reavis, JJ., concur.

WITNESSES—COMPETENCY—HUSBAND AND WIFE.—A wife claiming property as her separate estate against the creditors of her husband is not a competent witness in support of such claim. but there seems to be a division of authority on the point: Note to *De Farges v. Ryland*, 24 Am. St. Rep. 668.

GRAHAM v. McNEILL.

[20 WASHINGTON, 466.]

RAILROADS—RIDING UPON PLATFORM—NEGLIGENCE. It is not negligence per se for a passenger to ride upon the platform of a railway car, nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car.

RAILROADS—RIDING UPON PLATFORM—LIABILITY FOR INJURY.—If a passenger on a railway car is compelled, by reason of insufficient accommodations, to ride upon the platform, the company is answerable for injuries received by him while riding there, unless he was guilty of contributory negligence.

RAILROADS—RIDING UPON PLATFORM—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Whether a passenger, injured while riding on the platform of a railway car, was guilty of contributory negligence, is a question for the jury to determine from all the facts and circumstances of the particular case.

RAILROADS—RIDING UPON PLATFORM—WAIVER OF RULE.—A railway company's rule against passengers standing on the platforms of cars is waived when the company fails to provide a suitable seat for a passenger inside its coaches, and yet receives him on its train.

The railway train was operated by the defendant as receiver.

Cotton, Teal & Minor, for the appellant.

M. O. Reed and Craven & Canfield, for the respondent.

466 REAVIS, J. Action to recover damages for personal injuries sustained by plaintiff while passenger on a railway train operated by defendant. The complaint alleges that on the 7th of October, 1895, at the town of Oakesdale, plaintiff purchased from an agent of defendant an excursion ticket which entitled plaintiff to be transported as a passenger from Oakesdale, in the state of Washington, to the city of Spokane and return, on or before the ninth day of October, 1895; that plaintiff was transported according to the terms of the ticket to Spokane, and on the 9th of October, 1895, while returning home, at the instance and request of defendant and pursuant to the terms of the ticket, plaintiff entered one of the coaches of defendant's train carrying passengers from Spokane to Oakesdale, and by reason of the very crowded condition of the cars was unable to obtain a seat or room in any one of defendant's 469 coaches, and was compelled to ride, and did ride, upon the platform of one of the cars of the train; and while so riding the conductor permitted, compelled, and allowed the plaintiff to occupy such position upon the platform without objection or protest, well knowing at the time the overcrowded condition of each and every

one of the coaches in said train; and while the plaintiff was standing as aforesaid on the platform, by reason of the negligent, irregular, improper, overcrowded, overloaded, and careless manner in which the said train was being run by the defendant and the dangerous position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was, by a sudden, careless, and unnecessary lurch of the train, caused by the carelessness of the defendant, his servants and employes, in the management and operation of said train, thrown from the platform to the ground in a violent manner, and sustained serious injuries. The answer denies all of the allegations of negligence and damage contained in the complaint and sets up an affirmative defense, and, in substance, states contributory negligence, by allegations that the plaintiff was drinking when he left Spokane, and continued to drink, and was so far under the influence of liquor as to be intoxicated, and that such intoxication was not known to the defendant; that, after the train left, the plaintiff was standing upon the platform in a position where, if he had exercised care in preserving his balance, he would not have been injured; that while so standing on the platform the plaintiff's hat was blown off by the wind, and the plaintiff negligently and carelessly released his hold upon the railing of the car and with his right hand undertook to catch his hat, and in so doing lost his balance, fell from the platform to the ground, and was thereby injured; and that the plaintiff was not thrown from the platform by a careless or unnecessary, or any, lurch of the train; that while so standing and ⁴⁷⁰ exercising care the plaintiff was in a safe position, where he could not have received the injuries complained of. The answer also affirmatively contains the following allegation: that the fact that the plaintiff was occupying the platform was not known to any of the defendant's agents or servants, and that the position occupied by the plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence. The plaintiff's reply merely denies each and every allegation of new matter contained in the separate defense of the answer. Evidence was submitted by both parties upon the issue of contributory negligence tendered by the defendant—upon the part of plaintiff, that he exercised due care while standing on the platform; and by defendant, some evidence tending to show that plaintiff attempted to catch his falling hat and thereby fell. No evidence was directly introduced as to whether the platform, under the

circumstances, was in itself a dangerous place, or otherwise. The evidence showed that an excursion train was advertised and passengers invited to procure tickets therefor from Oakesdale to Spokane, to visit the fruit fair in the latter city; and the advertisement also requested the passengers to notify the agent, so that necessary equipments could be ordered. A large number of passengers were carried to Spokane between Monday, the 7th, and the 9th of October. On the 9th the railroad company carried a crowd of people home on twelve coaches, drawn by one engine. The evidence tends to show that all the seats were occupied and that the aisles were very much crowded in the respective coaches, and that people were riding on all the platforms of the train. The plaintiff got on the train at Spokane on the 9th and passed through six crowded coaches, looking for a seat. The aisles were crowded with people standing along between the seats and leaning over upon them. The plaintiff then took a position on the platform at the rear ⁴⁷¹ end of the coach, where he stood. There were six other passengers standing between the two coaches, one or two of them being ladies; and there were ladies generally, as well as men, carried on a number of the platforms of the coaches. The conductor took up the ticket of plaintiff while he was standing upon the platform, and said nothing about the position which plaintiff or anyone else occupied on the platform. While the train was going at considerable speed, and on rather an incline, use of the air brake caused the coach on the platform of which plaintiff was standing to jolt or lurch, and plaintiff was thrown from the train and injured. After the introduction of testimony on the part of the plaintiff had been concluded, defendant moved for a nonsuit, which was overruled; and thereafter, at the conclusion of the case, defendant asked for an instruction for a verdict for itself, which was refused. A verdict was returned for plaintiff and judgment entered thereon.

A number of objections were taken to the instructions of the court by the counsel for the defendant, and also objections to refusal by the court to give instructions tendered by counsel for defendant. Instructions which are deemed material here were given as follows:

"Now, gentlemen of the jury, if you find from the evidence in this case that the plaintiff was a passenger upon this train at the time alleged, and that he fell or was thrown from the train, or from the platform, as alleged in both the complaint and answer, I believe, of one of the coaches, it is for you to deter-

mine from the evidence in this case, first, as to whether or not the plaintiff was on that platform from his own choice, or whether or not the cars of the defendant upon that occasion were crowded in such a condition that it necessitated him to take up a position upon the platform in question in order to ride from Spokane to Tekoa.

"Now, you are further instructed by the court that if you find from the evidence in this case that there was no ⁴⁷³ room inside of the cars for the plaintiff to either sit or stand, or that there was any other reason justifying the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff, while he was standing upon the platform, to take reasonable precaution to prevent being thrown from the train by the motion thereof from where he was; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train by the motion thereof, which could reasonably be expected when running, then I charge you that the plaintiff cannot recover and you must find for the defendant.

"The jury are further instructed that it is the duty and obligation of a common carrier of passengers for hire to furnish passengers with seats for their accommodation; and, if you find from the testimony in this case that the defendant in this case received the plaintiff as a passenger, the plaintiff thereby became entitled to a seat in one of the cars of the defendant's train, and it is not the duty of the plaintiff to go from car to car while the train is in motion to find a seat; and if the defendant received the plaintiff as a passenger and failed to furnish plaintiff with a seat then the court instructs you that it was not negligence for the plaintiff to take a position upon the platform of one of the defendant's cars, provided that said position was one where a person exercising ordinary care and prudence would be safe from injury if the train of the defendant were run in a careful manner.

"The jury are further instructed that if you find from the evidence in this case that the defendant failed to furnish accommodations for the passengers on the train mentioned, so that a large number of passengers upon that train were compelled to stand in the aisles and upon the platforms of those cars, then you must find that the defendant was guilty of negligence; and if you find that the defendant was guilty of negligence, you cannot find that the defendant is liable to the plaintiff in this action, unless you find the plaintiff himself was free from negligence upon his part.

"The jury are instructed that if there were no vacant ⁴⁷³ seats in the car of defendant, the plaintiff is not chargeable with negligence in standing on the platform of the car of the defendant, providing that you find that was the most comfortable and convenient place for the plaintiff to occupy on the trip, and the defendant is not absolved from liability for injury to a passenger while riding on the platform of a car, unless the defendant provided room inside of the car for the proper accommodation of the passengers, and that a mere space on the inside in which to stand between the seats is not ordinarily such proper accommodation. If the jury find from the evidence in this case that there were in fact no vacant seats in the car of the defendant, it is for you to determine whether it was negligence on the part of the plaintiff to stand on the platform, even if there was room to stand in the inner gangway.

"And you are further instructed that in no case can you find for the plaintiff, unless you find that the defendant was guilty of some negligence by himself or some of his agents or servants.

"If the defendant was guilty of negligence in furnishing seats for the passengers, including the plaintiff, but the plaintiff, through his own carelessness and negligence, caused the injury, then you should find for the defendant."

The court, at the request of defendant, gave the following instruction: "If you find from the evidence that there was no room inside the car for the plaintiff to either sit or stand, or that there was any other reason (to) justify the plaintiff in remaining upon the platform, I charge you that it was, even under such circumstances, necessary for the plaintiff while he was standing upon the platform to take reasonable precaution to prevent from being thrown from the train by the motion thereof while running; and if you find from the evidence that the plaintiff failed to take such precaution, and by reason of such failure was thrown from the train by the motion thereof, reasonably to be expected when running, then I charge you that the plaintiff cannot recover, and you must find for the defendant."

The testimony discloses that notices were posted on the coaches of defendant's train that passengers must not stand ⁴⁷⁴ on the platform, and that passengers were not allowed to go upon the platform of the car while the train was in motion.

It will be observed that the complaint charged that, while the plaintiff was standing on the platform, by reason of the careless manner in which the train was being run and the dangerous

position which the plaintiff was forced to occupy by reason of the overcrowded condition of the cars, he was by a sudden, careless, and unnecessary lurch of the train, caused by carelessness of the defendant in the operation of the train, thrown from the platform to the ground in a violent manner. And the answer, after denying the negligent acts charged in the complaint, alleges that the position occupied by plaintiff upon the platform was not dangerous to any person occupying the same and exercising reasonable care and prudence, and that plaintiff was standing upon the platform in a position where, if he had exercised care in preserving his balance, he would not have been injured. An inspection of the record at the trial indicates that the theory upon which the defense was conducted was that the plaintiff contributed to the falling from the train by his own carelessness in balancing and standing upon the platform. The question of the occupation of the platform by plaintiff in itself being dangerous was not particularly brought to the attention of the court or jury until instructions were requested. It was insisted by the defendant, however, during the trial, that it was not negligence contributory to the accident, on the part of the defendant, to fail to have the necessary cars and provide the necessary accommodations for its passengers returning from Spokane on the 9th of October. Counsel for defendant now urge that it is prima facie negligence, or negligence per se, as a matter of law, for a passenger to stand upon the platform of a railway train in motion, and that, where such position is plainly the cause of the passenger's ⁴⁷⁵ injury, he is guilty of negligence, as a matter of law, and that, where such position is not plainly the cause of the injury, the question of contributory negligence should be left to the jury as a fact; and the familiar rule is stated that every man in the possession of his faculties is responsible for the consequences reasonably to be anticipated from his own acts, and it is contended that reasonably prudent men do not, under ordinary circumstances, stand upon the platforms of trains in motion, and, when the passenger is thrown from the platform by some sudden lurch or jerk, then his standing upon the platform is plainly the cause of his injury; and many cases are cited by counsel, some of which sustain their contention, but some of which are upon facts essentially different from those in the case at bar. For illustration, in the case of *Cleveland etc. Ry. Co. v. Moneyhun*, 146 Ind. 147, the plaintiff went out, not upon the platform, but upon the lower steps of the platform, and leaned over, and

by a lurch of the train was thrown therefrom. A number of cases are also cited upon the presumption of negligence from the happening of the accident, and the presumptions arising therefrom, and also other cases where proper accommodations were provided for the passenger inside the coach, and he left and went out, and stood on the platform. But none of the cases examined are exactly in point with the facts under consideration here. In Hutchinson on Carriers, second edition, section 652, it is stated: "Whether standing upon the platform of a railway car voluntarily, and without any necessity for so doing, would be evidence of the want of such due and reasonable care on the part of the passenger as would exonerate the company from liability in case of an accident resulting in his injury, would, of course, depend upon all the circumstances, and would be the proper subject of inquiry by a jury": ⁴⁷⁶ See Willis v. Long Island R. R. Co., 34 N. Y. 670; Werle v. Long Island R. R. Co., 98 N. Y. 650; Graham v. Manhattan Ry. Co., 149 N. Y. 336; Merwin v. Manhattan Ry. Co., 113 N. Y. 659.

Beach on Contributory Negligence, second edition, section 149, says: "It is not negligent per se for a passenger to ride upon the platform of a railway car; nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car."

In Willis v. Long Island R. R. Co., 34 N. Y. 670, it was said: "There is no rule of the common law which makes it the duty of the passenger to the carrier to select a position in the vehicle least exposed to danger through the wrongful act of the proprietor. A seat on the outside of a stagecoach may be more hazardous than an inside seat if the driver negligently overturns it on a pavement or a hillside; but the selection of that position is neither negligence per se nor tributary in a legal sense to the injury."

Mr. Justice Miller, in Marquette v. Chicago etc. R. R. Co., 33 Iowa, 564, said: "It is not, at common law, necessarily negligence in a passenger to ride on the platform of a car: Meeself v. Lynn etc. R. R. Co., 8 Allen, 234. It certainly is not improper for him to do so if he cannot get a seat inside: Shearman and Redfield on Negligence, sec. 284. Nor is it negligence in passengers, unable to find seats in a car, to pass into another, by direction of the conductor, while the train is in motion: McIntyre v. New York Cent. R. R. Co., 43 Barb. 532. For while moving from one car to another, without cause, while a train is in motion, may be negligence, yet, if a passenger does

so in obedience to a direction or request of the officer in charge of the train, the act may be deemed consistent with proper care, since passengers have a right to rely on the judgment of the officers of the train in respect to such matters, and are bound to obey the reasonable directions of such officers: *Shearman and Redfield on Negligence*, sec. 285.

477 "In judging of what is negligence in a particular case, regard is to be had to the growth of science and the improvement of the arts which take place from time to time; for many acts or omissions which are now evidence of gross negligence were but a few years ago consistent with great care and skill. And, on the other hand, many things, which a few years since would have been considered negligence, are now consistent with proper care and skill: *Shearman and Redfield on Negligence*, sec. 7. And especially is this true in respect to railroad carriages, which within a few years have been transformed from crude and clumsy cars into magnificent traveling palaces, supplied in many cases with the comforts, conveniences, and even luxuries of elegant dwellings, in which the public may travel at a speed and with a degree of safety which thirty years ago would have been in the highest degree perilous to life and limb. And within a very short period there have been such wonderful improvements in the platforms and couplings of railway passenger coaches as that passengers may, with comparative safety, pass from the other cars of a train to the sleeping and dining coaches, on some of the fastest trains of this country, while in motion.

"Daily, ladies, with and without gentlemen, by hundreds pass from car to car, and especially to sleeping and dining coaches, while the train is moving at a rate of speed much above twenty miles an hour, and yet accidents from this practice seldom occur. It cannot be true, therefore, as a matter of fact, that to pass from one car to another, while the train is in motion at the usual rate of speed, is so necessarily dangerous that it may not be justified under any circumstances; nor can it be true as a fact that the removal of a passenger from one car to another, while the train is moving at its regular speed, is so necessarily dangerous as that it cannot lawfully be done by the officer in charge of the train, under any circumstances, or for any cause. But, if the fact were otherwise, it should be left to the jury to find upon the evidence, and it is not the province of the court to pronounce it so as matter of law."

Wood on Railroads, section 308, declares the rule: "A railroad company is bound to furnish its passengers ⁴⁷⁸ reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that the passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there." See, also, section 309 as to the duty of the railroad company to furnish each passenger with a seat. It cannot be successfully maintained now that the platform of a railway train is necessarily such a position of danger that no ordinarily prudent person would go upon it while the train was in motion. Such contention would be false to common experience in railway travel. Prudent and careful persons do frequently go across platforms of moving trains, and do stand upon them; and the conductors of trains do collect fare from passengers upon platforms, and frequently on ordinary roadways, and in first-class passenger coaches, do not take any notice of such position of travelers. As observed by some of the courts, the modern improvements for safety in coaches, platforms, train appliances, and roadways have largely modified the risk of standing on the platform. But the defendant in this instance had a notice to the passengers to keep off the platform. Companies may make reasonable rules, and the passenger must obey them. Such a rule could doubtless be enforced, but such rules may also be waived by the acts of the company. Hutchinson on Carriers, *supra*, very fairly states the rule. But the defendant in this case waived its notice against standing on the platform when it failed to provide suitable accommodations for the plaintiff inside its coaches, and yet received him on its train. In the case of *McQuillan v. Seattle*, 10 Wash. 465, 45 Am. St. Rep. 799, it was said: "Generally, the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury."

⁴⁷⁹ The evidence discloses clearly that defendant was negligent in its duty to the passenger when the train left Spokane in its overcrowded condition. Not only did it not furnish seats for the passengers, but the passageways inside the coaches were crowded by standing passengers, and the platforms had men and women standing thereon who could not be accommodated inside the coaches; and, as has been observed by some of the authorities, it is the duty of the conductor to seat passengers. The instructions given by the superior court are not phrased in happy terms, perhaps; but, taken altogether, the question of

contributory negligence, and also of the principal negligence, was fairly submitted to the jury, and the case cannot be reversed because the language used in the instructions was not aptly chosen and may be open to criticism.

The judgment is affirmed.

Anders, Dunbar, and Gordon, JJ., concur.

RAILROADS—RIDING UPON PLATFORM—OVERCROWDED CARS—NEGLIGENCE—LIABILITY.—A passenger injured by a collision is not guilty of contributory negligence by standing on the platform while the cars are in motion, if there is no vacant seat for him within the car: Note to *Memphis etc. R. R. Co. v. Benson*, 4 Am. St. Rep. 780, showing that a passenger has a right to be provided with a seat. If he is unable to find a seat, it has been held that, if there is standing room inside, he must go in, when requested so to do by a trainman, and that, if he stands on the platform, near the edge, without a request to go inside, and is thrown off by an ordinary jolt and injured, he has no cause of action against the company, for he is guilty of contributory negligence: *Camden etc. R. R. Co. v. Hoosey*, 99 Pa. St. 492, 44 Am. Rep. 120; *Graville v. Manhattan R. R. Co.*, 105 N. Y. 525, 59 Am. Rep. 516. The fact that a passenger stands or rides on the platform or steps of a crowded street railway car, on which there are no vacant seats, is not such contributory negligence per se as bars a recovery for injuries received through the negligence of the railway company or its employé: Note to *Watson v. Portland etc. Ry. Co.*, 64 Am. St. Rep. 271. See *Clark v. Eighth Avenue R. R. Co.*, 86 N. Y. 135, 93 Am. Dec. 495. It is gross negligence for a street railway corporation to overcrowd and load down its cars with passengers beyond any reasonable limit: *Richmond etc. Electric Co. v. Garthright*, 92 Va. 527, 53 Am. St. Rep. 839.

IN RE MANEY.

[20 WASHINGTON, 509.]

EXTRADITION—INTERSTATE—PASSING OF PRISONERS THROUGH ANOTHER STATE—HABEAS CORPUS.—If, owing to the topography of the country, convicted prisoners cannot be conveyed from the place of their conviction to the penitentiary without passing through another state, they are not entitled, while passing through the latter state in the custody of an officer, to writs of habeas corpus, on the ground that they are illegally detained as fugitives from justice, for such facts do not present any question concerning fugitives from justice who have escaped from any other jurisdiction.

HABEAS CORPUS—PASSING OF PRISONERS THROUGH ANOTHER STATE.—If prisoners, legally convicted and sentenced for the crime of murder, are, in a case of necessity, taken through another state on their way to the penitentiary, and apply for writs of habeas corpus in the latter state, their application must be denied, where it is admitted that there was a valid judgment of conviction, for such judgment will be given credit under the "full faith and credit" clause of the federal constitution.

HABEAS CORPUS—DENIAL OF JURISDICTION BY PETITIONER.—One who appeals to the jurisdiction of a court to have his right of personal liberty determined on a writ of habeas corpus cannot question the power of the court to proceed to a complete determination of the case.

James L. Crotty, F. C. Robertson, and William H. Reid, for the appellants.

Forster & Wakefield and A. K. Sedgwick, for the respondents.

⁵⁰⁰ **DUNBAR, J.** The appellants were convicted of the crime of murder, in the district court of Idaho for Kootenai county. One of them was sentenced on his own confession, and the other was regularly convicted and sentenced. The topographical condition of the country is such that it is a physical impossibility to convey prisoners from Kootenai, in Idaho, to the penitentiary at Boise City, ⁵¹⁰ without passing through the state of Washington. While they were in charge of the officer duly qualified to convey them to the penitentiary and were passing through Spokane county, in this state, an application was made in their behalf for a writ of habeas corpus, alleging in the petition that they were illegally restrained of their liberty by Charles Van Dorn, the Idaho officer, who was conveying them to the penitentiary, and who had neither process nor warrant valid in this state, nor cognizable under the laws of this state, authorizing him so to do, and the petitioners were illegally deprived of their liberty within this state. Upon the trial by the superior court of Spokane county the writs were denied, and petitioners were remanded to the custody of the sheriff of Spokane county pending the decision of this court in the premises.

It is insisted by counsel for appellants that the only way in which these petitioners can be legally held in this state is under the extradition laws based on section 2 of article 4 of the constitution of the United States, which provides that a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. But we do not think that the admitted facts in this case show that there is any question concerning fugitives from justice who have escaped from any other jurisdiction, but that the appellants are simply appealing to the courts of this state to aid them in escaping.

It was held in the Matter of Fetter, 23 N. J. L. 311, 57 Am. Dec. 382, that the power of arresting and detaining offenders against the laws of other countries exists of necessity, independent of constitutional provisions or treaty obligations. It is equally necessary to the administration of justice and to protection of society that the state courts must have power ⁵¹¹ to prevent the state from becoming an asylum for murderers and other criminals. This much in the interest of the state within whose boundaries the criminal appears, outside of the law of comity which exists between different states. Section 1 of article 4 of the constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and further provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Now, Congress did provide, as is shown by section 905 of the Revised Statutes of the United States, the manner in which the records and judicial proceedings should be authenticated. The proceedings in this case were authenticated according to such enactment. The only object in suing upon a judgment from one state in another state is for the purpose of determining whether or not such judgment was rendered in the sister state, and, if so, whether it was rendered with proper jurisdictional authority. When that fact is ascertained, full faith and credit will be given to such judgment. Now, in this case it is not denied that judgment of conviction was rendered against these defendants. In fact, it is admitted that they were legally convicted of the crime of murder and legally sentenced. The ascertainment of the fact of the proper and jurisdictional judgment having been entered in the Idaho courts, then, being eliminated from this case by confession, there is nothing for the court to do but to give credit to the judgment of the Idaho court, and, if such credit be given in spirit, the demands of the appellants must be denied.

It is contended by the appellants that the court has no jurisdiction to order them now returned into the custody of the keeper. But it was the appellants who appealed to the jurisdiction of the courts of this state, and they cannot ⁵¹² now be heard to say that the court has not jurisdiction to proceed to a complete determination of the case.

The judgment will be affirmed, and the superior court in-

structed to return the appellants to the care of the officer from whom they were taken when the writ was applied for.

Gordon, C. J., and Fullerton and Anders, JJ., concur.

JUDGMENT OF SISTER STATE—"FAITH AND CREDIT."—Under the federal constitution the judgment of a sister state must be accorded in this state the same faith and credit which it has in the state where it was rendered: *Crumlish v. Central Imp. Co.*, 88 W. Va. 390, 45 Am. St. Rep. 872.

STATE v. NUGENT.

[20 WASHINGTON, 522.]

INCEST—WHAT IS—CONSENT OF FEMALE.—If a male person and a female person, being within the degree of consanguinity within which marriage is prohibited by law, have sexual intercourse with each other, he is guilty of incest, whether such intercourse was had with or without her consent.

W. W. McCredie, for the appellant.

Charles L. McDonald, prosecuting attorney, for the state.

522 GORDON, C. J. The defendant was convicted of the crime of incest. For a reversal of the judgment he relies upon a single assignment of error. The question presented is, Can the crime of incest be committed without the concurrent consent of both parties to the sexual act? That it cannot has been held in numerous cases: *De Groat v. People*, 39 Mich. 124; *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *State v. Thomas*, 53 Iowa, 214; *State v. Jarvis*, 20 Ore. 437, 23 Am. St. Rep. 141; *Yeoman v. State*, 21 Neb. 171.

523 The doctrine upon which these cases rest is, that it is a joint offense and can be committed only by consenting parties; that to constitute the crime both parties must be guilty; that there must be a union of minds as well as of actions; that force and want of consent exclude incest, and what is rape cannot be incest.

But we are disposed to agree with Mr. Bishop that, in principle, the doctrine has no just foundation: Bishop on Statutory Crimes, sec. 660. Our statute provides (*Ballinger's Code*, sec. 7229; *Laws 1895*, sec. 2, p. 371): "Persons being within the degree of consanguinity or affinity within which marriages are prohibited by law, who intermarry with each other, or who

commit fornication or adultery with each other, or who carnally know each other, shall be deemed guilty of the crime of incest, and upon conviction thereof shall be punished by imprisonment in the state prison for any term not exceeding twenty years."

"The purpose of the statute was to punish sexual intercourse between "persons being within the degrees of consanguinity or affinity within which marriages are prohibited by law." If it be true that both parties must be guilty or neither can be, then it must follow that, if the female is under the age of consent or an imbecile, the crime cannot be incest. We cannot subscribe to such a doctrine. It is illogical and in disregard of the fundamental principle that each must answer for the consequences of his own act, and his own guilt does not depend upon the conduct or mental condition of another. Bearing in mind the main purpose and object of the statute and the principle underlying it, we think it may be construed so as to make the plural "persons" include the singular "person." This construction is expressly authorized by statute. Section 4788 of Ballinger's Code (2 Hill's Code, sec. 1711) provides that "words importing the plural may be applied to the singular." And the words "with each other" do not ⁵²⁴ necessarily imply that both must be guilty. We think there is nothing of controlling importance in the particular form of expression.

The holding in *State v. Thomas*, 53 Iowa, 214, was by a divided court—three to two—Justice Beck dissenting in an opinion of remarkable clearness, in which Justice Day concurred. The decision in that case seems to us to have been substantially overruled in the later cases of *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349; *State v. Hurd*, 101 Iowa, 391; *State v. Kouhns*, 103 Iowa, 720.

In *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, decided in 1893, in which the entire court concurred, it is said: "Guilt may exist and is none the less enormous because the act was without the consent of the female." In the still later case, *State v. Hurd*, 101 Iowa, 391 (1897), the court say: "But we hold that, even though it were rape, if the relationship existed essential to the crime of incest, it would be incest—that is, incest would be included in the crime of rape." In our view the consent or nonconsent of the female is of no importance, except as it bears on the question of the weight or credit to be given her testimony as being or not being that of an accomplice. If she consented to the sexual act, she is an accomplice

and her testimony is the testimony of an accomplice. But the intercourse and the relationship being established, it is immaterial—as regards the question of defendant's guilt—whether the act of intercourse was or was not with her consent. This view is supported by the following authorities: *State v. Hurd*, 101 Iowa, 391; *People v. Barnes*, 2 Idaho, 148; *People v. Kaiser*, 119 Cal. 456; *Mercer v. State*, 17 Tex. App. 452; *State v. Kouhna*, 103 Iowa, 720; *Commonwealth v. Goodhue*, 2 Met. 193; *Commonwealth v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248, 10 Am. & Eng. Ency. of Law, 341.

525 The judgment is affirmed.

Dunbar, Reavis, and Anders, JJ., concur.

INCEST.—THE CONSENT OF BOTH PARTIES is not essential to the crime of incest: *Smith v. State*, 108 Ala. 1, 54 Am. St. Rep. 140.

POTTER v. NEW WHATCOM.

[20 WASHINGTON, 569.]

LIMITATIONS OF ACTIONS—CITY WARRANTS.—The statute of limitations does not commence to run against a city warrant until there is money in the city treasury which may be applied to its payment and until its holder has had such notice as will enable him to present it for payment to the city treasurer.

MUNICIPAL CORPORATIONS—NEGLECT OR OMISSIONS—LIABILITY.—A city, like an individual, is answerable for neglect or omissions resulting in injury or damages.

MUNICIPAL CORPORATIONS—CONVERSION OF MONIES BY CITY TREASURER—LIABILITY.—A city is answerable to its warrant holders for the safe custody and proper payment, upon warrants, of money collected by its treasurer, upon an assessment for a street improvement, but which have been misapplied or converted by him.

Fairchild & Bruce, for the appellant.

T. E. Cade and S. A. Callvert, for the respondent.

530 **REAVIS, J.** Action on warrants drawn against a street improvement fund assessment district in the city of New Whatcom. The city of New Whatcom had entered into a contract for improving streets, and, in discharge of the contracts with the contractors, delivered warrants drawn payable out of street improvement funds for the assessment districts in which the improvement was done. These warrants were assigned to the

respondent. The city answered and pleaded: 1. The statute of limitation of two years, and 2. That of three years, and set forth that the city treasurer collected large sums of money due to various funds and accounts on various street assessment districts, as well as for other purposes, and that a portion of the ⁵⁹⁰ money so collected was represented by the amounts named in the complaint; that the city treasurer did not, however, cover the money, or any part thereof, in the treasury of the city, but converted the same to his own use, and that none of the money ever came into the hands of the appellant; that such facts became known to the city about the first day of September, 1893, and the respondent was informed of it as early as the 1st of January, 1894, and had full knowledge of the conversions and defalcations of the city treasurer, and was apprised that the money had been wrongfully and unlawfully converted by the treasurer; and further set out that the city took steps to collect on the bond of the treasurer the money referred to in the complaint, together with other moneys then due, and that an adjustment was made by which property was turned over, exhausting the treasurer and bondsmen to the extent of their liability, and that appellant has set apart such property for a special fund, and proposes to pay it out pro rata to the various funds with which the treasurer was chargeable, and that none of the property has so far been converted into money; and all of these facts were known to the respondent more than three years before the commencement of the suit. The respondent demurred to the answer on the ground that it did not state facts sufficient to constitute a defense, which demurrer was sustained; and appellant, declining to plead further, brings the cause here, and assigns as error the judgment sustaining the demurrer to the answer.

Without reviewing specifically the various errors assigned upon the order sustaining the demurrer to the defenses, it may be declared that the action is upon a written contract, the nature of which was very well defined in *Union Sav. Bank etc. Co. v. Gelbach*, 8 Wash. 497: ⁵⁹¹ "Now a warrant, under our statutes, is a promise to pay it, in its order of issue, when money applicable to it comes into the treasury; and its maturity, by analogy with a note, is the time when the treasurer gives notice of his readiness to pay it, and stops the interest."

In the case at bar, manifestly the statute of limitations could not begin to run until there was money in the treasury applicable to the payment of the warrants, and the holder of the war-

rants had such notice as would enable him to present them to the treasurer for payment. But the answer further disclosed that the money was collected by the city treasurer, but afterward converted to his own use, and that the city then made a composition with the treasurer and his sureties, by which it accepted property in lieu of the money which the treasurer had wrongfully converted to his own use. The city, as a trustee for the warrant holder, could not make such composition, and then avoid the payment of the warrants. It could take nothing but money, consistent with its trust. It cannot require the warrant holder to wait until it may convert property into money. Its duty was to collect the money in the treasury. This seems to have been done in the first instance, for there is no doubt but the authorized collection of the assessment by the city treasurer was the act of the city; and when the money was collected, as between the city and a warrant holder, the city was responsible for its custody and payment upon the warrants. The city charter, under which these assessments were made, provided: "The money collected upon assessments for the improvement of streets and alleys shall be kept as a separate fund, and in no wise used for any other purpose whatever": Charter of Whatcom; Laws 1883, sec. 15, p. 153.

Certainly, the city did not regard the collection of these assessments as made by the city treasurer as an individual only, because it afterward held him and his sureties responsible ⁵⁹² for this money, and took property from them to the extent of their liability, in satisfaction of the defaults and conversions of the city treasurer. If no assessment had been made under the contracts for the local improvements, and no money collected, the action would not lie; but, as the money has been collected and misapplied by the city, it can be recovered by the warrant holder.

"Municipal corporations, like individuals, are liable for neglect or omissions resulting in injury or damages": Dillon on Municipal Corporations, 968.

The judgment of the superior court is affirmed.

Gordon, C. J., and Dunbar and Anders, JJ., concur.

LIMITATIONS OF ACTIONS—WARRANTS FOR THE PAYMENT OF MONEY.—The general rule is that the statute of limitations runs for or against towns and cities, and also for or against counties, in the same manner as it does for or against individuals; that the statute does not commence to run against a county warrant until it is presented for payment, and payment denied, or against a

county warrant payable out of special fund until the fund out of which it is payable comes into existence. See note to *Arapahoe Village v. Albee*, 8 Am. St. Rep. 206.

MUNICIPAL CORPORATIONS—LIABILITY OF, FOR THE ACTS OF OFFICERS AND AGENTS.—A city is answerable for the acts of its officers and agents under powers conferred upon it for private, as distinguished from public, purposes: See extended notes to *Goddard v. Harpswell*, 30 Am. St. Rep. 403, 407; *Orlando v. Pragg*, 34 Am. St. Rep. 25; *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 92.

PHILADELPHIA MORTGAGE AND TRUST COMPANY v. MILLER.

[20 WASHINGTON, 607.]

REPLEVIN—THINGS CLAIMED AS FIXTURES—INADMISSIBLE EVIDENCE.—If mortgagors remove from the premises certain things claimed by the mortgagee to be fixtures, and who brings an action to replevin them, the intention with which the things in controversy were affixed by the mortgagors cannot be shown by proof of their homestead declaration on the premises. Such evidence is immaterial and inadmissible.

REPLEVIN—FIXTURES—MANTELS—BATHTUB—WATER HEATER—INADMISSIBLE EVIDENCE.—If mortgagors remove from the premises a porcelain bathtub, which stands on four legs and is connected in the usual manner with the soil pipes, certain stock mantels, and a water heater connected with the building by the usual methods of plumbing, and the mortgagee brings an action to replevin the articles, claiming them as fixtures, evidence as to whether or not the house was a finished one without such articles, and that the value of the premises was impaired by the removal of the things, is immaterial, irrelevant, and inadmissible.

FIXTURES—MIXED QUESTION OF LAW AND FACT.—The question as to whether or not a particular article or piece of machinery is a chattel or fixture is a mixed question of law and fact.

FIXTURES—FINDING AS TO—DISTURBANCE OF, ON APPEAL.—After a jury, under proper instructions, has determined, in a controversy between a mortgagee and a mortgagor, that certain things removed from the premises by the mortgagor are not fixtures, a court, on appeal, will not disturb their verdict unless it is clear, as a matter of law, that the property was, in fact, a part of the realty.

FIXTURES—MANTELS—BATHTUB—WATER HEATER.—Stock mantels, sold separately and made adaptive to any kind of a house, water heaters not attached to the building except by their plumbing connections, and modern porcelain bathtubs, all of which can readily be attached to, or detached from, the house without injuring the realty, are not fixtures as between a mortgagor and a mortgagee of the premises.

Smith & Cole, for the appellant.

William C. Keith and Preston, Carr & Gilman, for the respondent.

••• DUNBAR, J. The respondent borrowed six thousand dollars from appellant and secured payment of same by mortgage upon two lots in Seattle, on which was at the time a residence in which was domiciled respondent and family. At the time of the execution of the mortgage, there were in the residence four mantels. These mantels were of hard wood, the frames standing above the brick projection of the fireplace and extending down each side to the floor. They were about seven or eight feet high, consisting of a large center plate mirror and a series of small mirrors, brackets, and shelves. Subsequent to the execution of the mortgage, there was also placed in the residence a porcelain bathtub standing on four legs and connected in the usual manner with the soil pipes. A hot-water heater was ••• also connected with the building by the usual methods of plumbing. Appellant foreclosed its mortgage, and, upon the vacation of the premises by the respondent, he took from the house the mantels, the hot-water boiler, and the bathtub above described. The present action was brought to replevin the said mantels, bathtub, and heater. The matter was submitted to a jury and a verdict was rendered in favor of the respondent. Judgment was entered, from which this appeal was taken. So that it will be seen that the question to determine here is whether or not these articles in dispute were fixtures or chattels.

There are three assignments of error: 1. That the court erred in refusing to allow the declaration of homestead to be admitted in evidence; 2. That the court erred in not permitting testimony as to whether said residence was a finished residence without said articles annexed to it, and whether the value of the premises as a residence was impaired by their removal; and 3. That the evidence did not sustain the verdict. Plaintiff offered in evidence a certified copy of the record of declaration of homestead made by Eva J. Miller, wife of the respondent, which instrument, it is alleged, was offered for the purpose of indicating the intention of the respondent and wife to make said premises their homestead and any fixtures attached thereto permanent fixtures. To this offer counsel for respondent objected, and the objection was sustained. It seems to us that this evidence was incompetent and immaterial. There was no controversy over the fact that the house was built for the permanent residence of the respondent; and, if there had been, the fact of having filed a declaration of homestead would not tend to prove the intention with which the articles in controversy were af-

fixed. The homestead declaration might have been filed at any time, and it might have been filed prior or subsequent ⁶¹⁰ to the affixing of the hot-water boiler or bathtub to the building. We think that the evidence offered was absolutely immaterial and was properly refused. Neither was it material under the theory that the intention of the mortgagor must govern whether the residence was a finished residence without these disputed articles being annexed to it or not. The condition of the house was testified to, and the jury, if it was material to determine the question of whether the house was or was not finished, must have determined that question from the testimony submitted. And the offer to prove that the value of the premises as a residence was impaired by their removal was equally immaterial and irrelevant, for it is self-evident that the house would be of less value after the furniture was taken out than it would be with the furniture, conceding that the furniture was worth anything, and that concession, or rather allegation of value, is made by the complaint. So that the only remaining question is as to the character of these pieces of furniture.

There is a wilderness of authority on this question of fixtures and a hopeless conflict of decision. We have examined the cases cited by the appellant which have been decided by this court, and are unable to conclude that they tend to sustain its contention; and other cases, as we have before indicated, are so conflicting that it would be profitless to undertake to review or harmonize them. The question of whether or not the particular piece of furniture or machinery is a chattel or fixture has been held by a majority of the courts to be a mixed question of law and fact. In this case the court instructed the jury. These instructions were not excepted to and must be presumed to have correctly stated the law; and, the jury having found the facts in favor of the respondent, we would be loth to disturb their findings, unless we were compelled to say that, as a matter of law, the property sued for was a part of the ⁶¹¹ realty. In investigating a question of this kind, we cannot shut our eyes to the many changes that have been wrought by time in the fashion and character of household furnishings. Anciently, mantels were uniformly built as a part of the house, and therefore became a fixture to the realty. The house was built with reference to the mantel and the mantel with reference to the house. It was a part of the plans and specifications of the house, and could not have been removed without materially affecting, not only the appearance, but the real usefulness, of the

house. But advancing mechanical science and taste have evolved an altogether differently constructed mantel, and mantels such as are described by the testimony in this case are now constructed without reference to any particular house or particular fireplace. They are what are called "stock" mantels, and are sold separately and made adaptive to any kind of a house. They are, in fact, as much a separate article of merchandise as a bedstead or a table. So that, regarding the changed conditions in this respect, the rules of law must be changed and adapted to the changed character of the furniture. A few years ago, sideboards were constructed in, and were made a part of, the house, and were, of necessity, fixtures; while now they are ordinarily separate pieces of furniture, and, by common consent, are moved from one house to another. The same advancement has been made in bathtubs. The old-fashioned bathtub, that was sealed in and actually made a part of the bathroom, has largely given place to the more convenient bathtub, that rests upon legs and can be attached to any heating system that happens to prevail in the house where it is used. And so with heaters or boilers. In this instance the boiler is in no way attached to the building, excepting by its plumbing connections. It would be detached without in any way injuring the realty; and we see no reason why it should be considered a fixture any more than the ordinary ⁶¹² stove, which is connected by pipes to the boiler and to the plumbing system generally. One could be as easily detached as the other, and yet we think it has never been held by any court, or contended by anyone, that a stove, though connected by pipes to the plumbing system, was a fixture which could not be removed. In this instance the testimony was to the effect that these articles were not placed in the building at the time of its erection and completion, nor for a long time thereafter; that the mantels were not contemplated in the plans or drawings for the erection of the premises, nor included in the specifications under which said building was afterward completed; nor was there any provision made for the reception in said building of said articles. The testimony shows that the building back of the mantels, or that portion of it which was concealed by the mantels, was plastered and kalso-mined; that for about three years the mantels were not fastened to the wall in any way, but supported themselves in the position they occupied, and that, after that time, they were fastened to the wall by screws to render them more stable and keep them from toppling. The boiler and bathtub were not

placed in the building for several years after the mortgage was given.

The question of fact having been submitted to the jury under proper instructions, and a verdict having been rendered in favor of the respondent, the judgment will be affirmed.

Gordon, C. J., and Anders, Beavis, and Fullerton, JJ., concur.

FIXTURES—MORTGAGOR AND MORTGAGEE.—To constitute a fixture there must be an actual annexation to the realty, or something appurtenant thereto; otherwise there is no fixture: *Shepard v. Blossom*, 68 Minn. 421, 61 Am. St. Rep. 431; notes to *Lansing etc. Engine Works v. Walker*, 30 Am. St. Rep. 491; *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153; *Hunt v. Mullanphy*, 14 Am. Dec. 303. And things placed on realty in such a manner as to be removable without injury to it are not a part thereof: Note to *Fifield v. Farmers' Nat. Bank*, 39 Am. St. Rep. 172. Thus, a boiler situate in a house on mortgaged premises, made of copper and built into a furnace erected for that purpose, but capable of removal without injury to the building, is not a fixture, and does not pass to the mortgagee: *Hunt v. Mullanphy*, 1 Mo. 503, 14 Am. Dec. 300.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

PHOENIX CARPET COMPANY v. STATE.

[118 ALABAMA, 143.]

TAXES—PRIVILEGES OR OCCUPATIONS—CONSTITUTIONAL PROVISIONS AS TO EQUALITY AND UNIFORMITY—APPLICATION OF.—Constitutional provisions that "all taxes levied on property in this state shall be assessed in exact proportion to the value of such property," and that "the property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate," relate only to direct taxes on property. These provisions of equality and uniformity in the taxation of property alone do not apply to taxation on privileges or occupations.

TAXES—PRIVILEGES OR OCCUPATIONS—LEGISLATIVE POWER AS TO SPECIFIC TAXES.—The legislature must decide when and for what purpose a tax shall be levied, and must select the subjects of taxation; and specific taxes, such as those on privileges or occupations, are a valid exercise of the legislative power.

TAXES—ANNUAL PRIVILEGE TAX ON CORPORATIONS—WHAT STATUTE IMPOSES.—A statute requiring all corporations, foreign or domestic, doing business in this state, except banks and banking institutions regularly organized, not otherwise specifically required to pay a license tax, to pay "an annual privilege tax, graduated by the paid-up capital stock of the corporation," imposes a privilege or franchise tax, as distinguished from a tax on property, and is not offensive to those constitutional provisions which require equality and uniformity in the taxation of property.

TAXES—STATUTE AS TO ANNUAL PRIVILEGE TAX ON CORPORATIONS TAKES EFFECT, WHEN—RELATION TO OTHER ACTS.—A statute requiring corporations to pay an annual privilege tax takes effect from the day of its approval, unless a different time is specified in the act. Such a tax has no relation to, or connection with, taxes imposed on licenses exacted by pre-existing legislation, but is governed alone by the terms of the statute creating it.

TAXES—ADDING UNAUTHORIZED COUNTY TAX TO SPECIFIC TAX—EFFECT OF.—A county has no general authority to add a county tax to specific taxes imposed by the state. Hence, a county tax cannot, in the absence of any statute authorizing it, be

added to an annual privilege tax exacted of corporations doing business within the state, and the payment of a county tax cannot, therefore, be demanded as a condition precedent to the issuance of a license to such a corporation.

TAXES—ANNUAL PRIVILEGE TAX—CORPORATION MUST PAY—EXACTION OF UNAUTHORIZED COUNTY TAX—MANDAMUS.—If a corporation doing business in this state is required by statute to pay an annual privilege tax, the corporation is not justified in doing business without a license and without payment of the tax because of the exaction of an unauthorized county tax as a condition precedent to the issuance of a license. The company's remedy is mandamus to compel the issuance of the license upon payment of the state privilege tax imposed by the statute.

Walker Percy, Tillman & Campbell and James E. Webb, for the appellant.

William C. Fitts, attorney general, and Charles G. Brown, for the state.

¹⁴⁹ **BRICKELL, C. J.** At the 1896-97 session of the general assembly, an act was passed and approved February 18, 1897, entitled, "An act to amend the revenue laws of the state of Alabama." The fifteenth subdivision of the thirty-fifth section requires all corporations, foreign or domestic, doing business in this state, except banks and banking institutions regularly organized, not otherwise specifically required to pay a license tax, to pay an annual privilege tax, graduated by the paid-up capital stock of the corporation. The appellant, a corporation organized and existing under the laws of this state, doing business in the city of Birmingham, having a paid-up capital stock of five thousand dollars, on information filed in the criminal court of Jefferson county, was convicted of a violation of the subdivision, and from the judgment of conviction this appeal is taken.

The argument of the counsel for appellant proceeds on the hypothesis, which we are inclined to adopt, that three questions are presented by the record for consideration and decision, which they state in the following order: 1. Is not the subdivision violative of the first and sixth sections, taken in connection, of the eleventh article of the constitution? 2. If not violative of the constitution, did the subdivision take effect from the day of approval of the act, or is it postponed in operation until the first day of January next? 3. By force of the general revenue laws, is a county tax added to the state tax?

¹⁵⁰ 1. The two sections of the constitution supposed to be violated read as follows: "1. All taxes levied on property in this state shall be assessed in exact proportion to the value of such

property; provided, however, the general assembly may levy a poll tax, not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund in the county so paying the same." "Sec. 6. The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions or corporations devoted exclusively to religious, educational, or charitable purposes." These sections by their terms relate only to direct taxes on property—it is only such taxes which are levied and assessed; and, as to such taxes, they place corporations on an equality with natural persons; there can be no discrimination between them. But property, in the sense in which it is employed, is far from comprehending all the objects or subjects of taxation. Corresponding provisions are found in the constitutions of many, if not all, the States, and there is a general, if not a universal, concurrence of judicial decision that they do not limit legislative power in the imposition of specific taxes. In *Burroughs on Taxation*, section 54, referring to these provisions, it is said: "These provisions, as a general rule, are held to apply to property, and not to include taxation on privileges or occupations." And in *Sedgwick on Statutory and Constitutional Law*, second edition, 504-507, it is said: "In construing these provisions, it has been held, in many of the states, that the words 'equal and uniform' apply only to a direct tax on property, and that the clause in regard to uniformity of taxation does not limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. Specific taxes have, therefore, been sustained as a valid exercise of the legislative power." And in 1 *Desty on Taxation*, 336, it is said: "The provisions of the constitution as to equality and uniformity apply to property alone, and not to taxation on privileges or occupations. The legislature must decide when and for what purpose a tax shall be levied, and must select ¹⁵¹ the subjects of taxation." The authorities in support of this general doctrine are too numerous for citation. Many of them are collected and referred to in *Denver City Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 243; *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486.

The tax imposed by the subdivision has the properties and quality of a franchise tax—it is measured or graduated by the amount of the paid-up capital stock of the corporation, and

this distinguishes it from a tax on property. Speaking in reference to this inquiry, it was said by Clopton, J., in *State v. Stone-wall Ins. Co.*, 89 Ala. 338: "The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax; if the latter, a tax upon the property." Reference was made to *Bank of Commerce v. New York City*, 2 Black, 620, in which it was said by Nelson, J., speaking of a franchise tax: "The tax was like one annexed to the franchise as a royalty for the grant." The tax may be imposed on the creation of the corporation, but, if the charter or grant of incorporation does not expressly exempt it from taxation, a tax on the franchise may be subsequently imposed at the will of the legislature: *Burroughs on Taxation*, sec. 85; *Providence Bank v. Billings*, 4 Pet. 514. Taxation is a legislative power, comprehended in the general grant to the general assembly, except as it is specially restrained or limited by the constitution, or by the relation of the state to the general government; and in its exercise the general assembly is not under the superintendence and control of the judiciary. "It is enough for the courts," said Brewer, J., in *Newton v. Atchison*, 47 Am. Rep. 488, "that both occupations and property are legitimate objects of taxation; that they are essentially dissimilar; that constitutional provisions regulating the taxation of one do not control that of the other; and that there are no constitutional inhibitions on the taxation of business, either by the legislature directly, or by municipal corporations thereto empowered by the legislature."

We may concede that, when a tax is imposed on avocations, or privileges, or on the franchises of corporations, ¹⁵² it must be equal and uniform. The equality and uniformity consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed; and, if it be a franchise tax, upon all corporations belonging to the class upon which it is imposed: 1 *Desty on Taxation*, sec. 36; *Cooley on Taxation*, 2d ed., 378; *Delaware R. R. Tax*, 18 Wall. 206; *New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328; *Durach's Appeal*, 62 Pa. St. 491. The general assembly, in the legitimate exercise of the taxing power, may impose direct taxes on lands only, to the exclusion of every variety or specie of personal property; or, it may not tax lands, and subject personal property only to direct taxation. This is within the general grant of the power of taxation, which of necessity involves the

power of selecting that property or species of property which in the judgment of the legislature is the better able to bear the burden of taxation. And, as is said by Judge Cooley, "What is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the other untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by the constitution": Cooley on Taxation, 570. Corporations are of every character and variety—have grown to be almost as various and diverse in their franchises as are the avocations or pursuits of natural persons. The idea which seems to pervade the argument of counsel for appellant, that if one of these artificial beings, or one class of them, is selected as a subject of taxation, the whole body of private corporations, without regard to the diversity of their franchises, must be subjected to the like tax, finds no support in authority, and derogates from the power of the legislature to select the objects and subjects of taxation—a power, it may be admitted, capable of abuse, as is all human power, but, if abused, the corrective does not rest with the courts. Nor can it be said that it would be right or just to subject all these artificial beings, without regard to the diversity of their powers and franchises, to like taxation. We will not prolong discussion. The tax imposed ¹⁵³ by the subdivision is imposed for the purposes of revenue; it is of the "ways and means" the legislature has employed to meet the expenses of government, and its other pecuniary necessities, and is not offensive to the constitution.

2. Unless a different time is specified, statutes take effect and become operative from the day of the approval by the governor. Sedgwick on Statutory and Constitutional Law, 67; Sutherland on Statutory Construction, sec. 104; Taylor v. Hand, 31 Ala. 383; Branch Bank of Mobile v. Murphy, 8 Ala. 119. This general principle is not denied, nor is it contended that there are any words in the subdivision, or in the act of which it forms part, indicative of a legislative intention to postpone its operation to a future day. The contention is that such intention must be implied, or the subdivision will be inharmonious with the statute (Code of 1886, sec. 634), which declares that all licenses shall be for one year, and shall expire on the thirty-first of December, unless the business commences after the first of July, in which case the price of license shall be one-half of the year's license. The statute referred to has relation only to the

licenses designated in other sections of the code, and it cannot be referred to licenses and taxes exacted by subsequent statutes. There is no want of harmony in the operation of such statutes—each has its own field of operation, and the two can never collide or conflict. The subdivision exacts the tax and license from the corporation doing business in this state after the day of approval of the act. It is an annual tax the corporation is required to pay, and, from the day of its payment, the corporation, having obtained the license, is entitled to do business. It is a new license and tax exacted by the legislature, having no relation to or connection with the taxes imposed or licenses exacted by pre-existing legislation, and is governed by the terms of the statute creating it.

3. Counties have no inherent power of taxation; they have only such power as is delegated to them, and must have express authority of law to sanction the taxes they demand: *Cooley on Taxation*, 678; *Burroughs on Taxation*, sec. 138. The constitution recognizes the power of the general assembly to confer on them authority to levy direct taxes on property, but ¹⁵⁴ limits the authority to an annual levy of not more than one-half of one per centum of the value of the taxable property therein: *Const.*, art. 11, sec. 5. When the general assembly has imposed specific taxes for state uses, requiring a license not only as evidence of the payment of the tax, but as the condition on which a privilege may be exercised, or a business pursued, authority has been conferred on the court of county commissioners, the body through and by which all the powers of the county are exercised, if they deemed it necessary, to add to the state tax a county tax, not exceeding fifty per centum of the state tax: *Code* 1886, sec. 633; *Code* 1896, sec. 4132; *Pamph. Acts*, 1886-87, pp. 13, 316. A general authority to add a county tax to specific taxes the state may impose is not conferred. The power conferred is special—it is limited to the specific taxes enumerated in connection with it, and is to be exercised only when the commissioners' court deem it necessary, and keeping within the limitation prescribed, to the extent only they may deem it necessary. Authority is not conferred by the statute to add a county tax to the specific tax imposed on the franchises of corporations doing business within the state, and the judge of probate was in error in demanding the payment of a county tax as a condition upon which he would issue license to the appellant. The error should have been corrected by mandamus compelling the issue of the license—it affords to the appellant

no excuse or justification for continuing to do business without the license and without the payment of the tax.

We find no error in the record, and the judgment of the court below is affirmed.

TAXES—PRIVILEGES OR OCCUPATIONS—UNIFORMITY—A CONSTITUTIONAL PROVISION requiring all taxes to "be uniform," et cetera, applies only to a direct tax upon property, and does not apply to taxation imposed upon privileges or occupations: *Denver City Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 239, and note showing that the exaction of a license, whether by the state or a municipality, does not violate a constitutional provision respecting uniformity and equality of taxation.

TAXES—PRIVILEGES OR OCCUPATIONS may be taxed by way of exacting a license for carrying them on: *Denver City Ry. Co. v. Denver*, 21 Colo. 350, 52 Am. St. Rep. 239, and note; *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486; and license fees may be exacted of some persons and businesses without exacting them of others: Note to *State v. Goodwill*, 25 Am. St. Rep. 885.

TAXES—FRANCHISES OF CORPORATIONS.—A license tax imposed on corporations for exercising their franchises is not a property tax, and cannot conflict with constitutional provisions requiring equality in the taxation of property: *Standard etc. Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394. That a franchise of a corporation is, of itself, property and liable to taxation, and that a state may impose upon corporations of other states a tax for the privilege of carrying on their business within it, although no equivalent burden is imposed upon its domestic corporations, see notes to *Southern etc. Loan Assn. v. Norman*, 56 Am. St. Rep. 374; *New Orleans v. Great Southern etc. Tel. Co.*, 8 Am. St. Rep. 508.

STATUTES—TAKE EFFECT, WHEN.—A statute takes effect from its date when no time is fixed and there is no constitutional provision concerning it: Note to *Fox v. McDonald*, 46 Am. St. Rep. 117.

MANDAMUS lies where a party has a right to have a thing done, and there is no other specific way of enforcing it: *People v. Brooklyn*, 1 Wend. 318, 19 Am. Dec. 502.

SMITH v. HEINEMAN.

[118 ALABAMA, 195.]

PLEADING—ANSWERING BUT ONE OF SEVERAL COUNTS—DEMURRER.—If a complaint contains several counts, and a plea addressed to the whole complaint answers but one of the counts, a demurrer to the plea should be sustained.

ATTACHMENT—THE PRESUMPTION IS that property levied upon as that of the defendant is liable to attachment, and there is imposed upon the sheriff a prima facie liability to preserve and apply the property to the judgment when rendered; but this presumption is disputable, and the defendant may show that the property was not, in fact, subject to levy.

ATTACHMENT—CLAIM BY THIRD PERSON—TRIAL OF RIGHT OF PROPERTY.—When a sheriff attaches property to which a claim is interposed by a third person, there can be no statutory trial of the right of property until a claim bond is filed accompanied by an affidavit of a just claim, as required by the statute. A claim bond, unaccompanied by such affidavit, does not justify the sheriff's delivery of the property to the claimant.

FRAUDULENT CONVEYANCES—TRANSFER OF PERSONALTY—KNOWLEDGE OF PURCHASER.—If a person sells personal property, such as a stock of goods, with intent to hinder, delay, or defraud his creditors, and the buyer knows of such intent, or is informed of such circumstances as would lead a person of ordinary care and prudence to institute inquiry which, if followed, would disclose the intent, the transaction is fraudulent, though the purchaser may pay an adequate and valuable consideration; and this principle applies to a sale made by one partner to his copartner of the former's interest in the assets of the partnership business, particularly where the seller is insolvent.

SHERIFFS—FAILURE TO LEVY ON PARTNERSHIP PROPERTY—EXEMPTION—DEFENSE.—In an action by a creditor of a partnership against a sheriff for a failure to levy upon partnership property, the fact that one member of the firm sold his interest in the partnership assets to a copartner, and that such assets did not exceed in value the amount ordinarily exempt by law, is no defense for the reason that, in respect to partnership property, no exemption can be claimed as against partnership debts.

FRAUDULENT CONVEYANCES—TRANSFER OF PARTNERSHIP PROPERTY FRAUDULENT AS TO CREDITORS.—If two members of a partnership, being insolvent, make a transfer of its assets to the other member of the firm, the transfer is fraudulent as to partnership creditors, though made upon an adequate and valuable consideration.

SHERIFFS—FAILURE TO LEVY ATTACHMENT.—THE BURDEN of showing that the defendant in an attachment suit owned property subject to levy and which the sheriff neglected to seize is upon the one who seeks to make him answer for a failure to make the levy, for the presumption is that sworn public officers have performed their duty.

SHERIFFS—FAILURE TO LEVY ATTACHMENT—SHIFTING THE BURDEN.—If a sheriff fails to levy an attachment upon all property of the defendant subject to levy, and he is sued for such failure, evidence that several days before the levy the defendant owned more property than the sheriff afterward levied on does not create any such presumption against the officer as will shift upon him the burden of showing that his levy exhausted the defendant's property.

SHERIFFS—FAILURE TO SELL OR ACCOUNT FOR PROPERTY LEVIED UPON BY ATTACHMENT.—THE BURDEN is upon the plaintiff, in an action against a sheriff for failing to sell or to account for property of the debtor levied upon by attachment, to show the extent of his damage by proof of the value of the property at the time of the levy.

SHERIFFS—FAILURE TO LEVY ATTACHMENT—ENCUMBRANCE—LIABILITY.—A sheriff is not answerable for his failure to levy an attachment upon property which is mortgaged for a debt that exceeds the value of the property, for, in such a case, the plaintiff can lose nothing by the officer's failure.

SHERIFFS—FAILURE TO LEVY—PRIOR ATTACHMENT—LIABILITY.—A sheriff is not justified in refusing to levy an attachment because of a prior attachment levied on the same property, where the older attachment has been discharged prior to the return of the later one. He should levy unless the property is already under seizure by virtue of older attachments sufficient in amount to absorb the proceeds.

SHERIFFS—FAILURE TO LEVY ATTACHMENT—EVIDENCE INADMISSIBLE.—When a sheriff is sued for failing to levy an attachment upon the property of saloon-keepers, evidence as to whether they had taken out a license as retailers is irrelevant and inadmissible.

Action brought by the appellees, Samuel Heineman and Marcus Heineman, as partners under the firm name of Heineman Brothers, against Smith, lately sheriff of Jefferson county, and the sureties on his official bond as such sheriff. Suit was commenced on March 31, 1892. The complaint was for a breach of the official bond of the sheriff in failing to levy upon sufficient property of the defendants in the attachment suit to satisfy the demands of the plaintiffs, and in failing to sell or to account for certain personal property levied upon. The defendants pleaded the general issue, and several special pleas, among which was the eighth, mentioned in the opinion. In this plea, it was averred that, after the levy upon the personal property had been made, one F. M. Edwards claimed the property as his own, made affidavit that it was his property, gave a bond as claimant, and that the property was thereupon turned over to him. It was further alleged that the attachment was then returned to the court with an indorsement that the property so levied upon had been claimed by Edwards, and that he had given the claim bond, which was also returned to the court. The plaintiffs, however, proved that Edwards, when he gave his claim bond, did not make affidavit that he owned the property levied upon. The evidence for the plaintiffs tended to show that Nathaniel Stanley, W. T. Johnson, and Christopher Hinkle, as partners, under the firm name of Stanley & Co., were, on January 12, 1891, doing business in the city of Birmingham, at two different places there—

in, as saloon-keepers; and that Heineman Brothers had sold goods to Stanley & Co., and had obtained and levied an attachment, as stated in the opinion. One saloon was on First avenue and the other on Twenty-first street. The evidence of the plaintiffs tended to show that the attachment was levied upon the property found in the saloons at both places of business, with the exception of the bar fixtures. It was shown that Edwards gave a claim bond, and that the property levied upon was delivered to him. Christopher Hinkle was a nominal partner in the firm of Stanley & Co. On January 6, 1891, W. T. Johnson, of that firm, sold out his interest therein to Nat. Stanley, and plaintiff's evidence tended to show that, when making the inventory of stock in the stores owned by Stanley & Co., Edwards was present during part of the time, and knew that that firm was largely indebted; that the invoices seen by Edwards prior to the sale from Johnson to Stanley showed the bills of goods bought and the amount of the indebtedness of Stanley & Co.; that Edwards was on intimate terms with Nat. Stanley; and that, in the negotiations for the sale from Johnson to Stanley, Edwards was present when Stanley stated that the firm was badly in debt. On January 8, 1891, Nat. Stanley sold to Edwards the entire stock and property formerly owned by Stanley & Co., including the bar fixtures and outfit in both saloons. The price paid therefor by Edwards was two thousand two hundred dollars in cash. The plaintiffs' evidence tended to show that this last sale was fraudulent, it appearing that, at the time of making the purchase, Edwards knew of the insolvent condition of Stanley and the businesses which he was conducting, and that Edwards knew of the indebtedness to the plaintiff in this action; but the testimony for the defendant tended to show that Edwards knew of no indebtedness which was due by Stanley & Co., or by Nat. Stanley, except five hundred dollars, which was due to J. S. Smith, the defendant in this case, and which was paid to Smith as a part of the two thousand two hundred dollars, the purchase price paid by Edwards, as above stated; and that the purchase by Edwards was made in good faith upon a present consideration. When Edwards made his purchase, he executed a mortgage on the bar fixtures in the saloon at First avenue, to secure the payment of the money which he borrowed for the purpose of making the cash payment to Stanley, and this mortgage existed when the attachment was delivered to the sheriff. There was a judgment for the plaintiffs in the sum of

nine hundred and fifty dollars and ninety-five cents, and defendants appealed.

Hewitt, Walker & Porter, for the appellants.

Lane & White, for the appellees.

²⁰² BRICKELL, C. J. This is an action in which the appellees were plaintiffs, against the appellant Smith, as sheriff of Jefferson county, and the sureties on his official bond. The complaint contains two counts. In the first, the breach assigned is, that on the twelfth day of January, 1891, an attachment in favor of plaintiffs against certain persons as partners, under the name of Stanley & Co., was placed in the hands of the sheriff, and that, on January 14th, he levied the same upon certain described personal property. That plaintiffs obtained judgment in the attachment suit June 5, 1891, and condemnation of the property levied on, and that, on July 6th, an order was issued directing a sale by the sheriff of the attached property, but that the sheriff failed to sell or account for the same. In the second count, the issue of the attachment and its levy by the sheriff is alleged as in the first count; and it is also averred that the defendants had sufficient property in the county of Jefferson subject to levy to satisfy the demands of the plaintiffs, but that the sheriff had failed to levy upon such property.

Demurrers to all the pleas except the eighth were overruled, and as to the eighth were properly sustained. The plea was addressed to the whole complaint, but answered only the first count. *Kennon v. Western Union Tel. Co.*, 92 Ala. 399. It also affirmatively appears that the defendants had, under other pleas, the full benefit of every fact alleged in the special plea; so that, if error had intervened, it would have been error without injury. *Owings v. Binford*, 80 Ala. 421. The fact that the sheriff received the attachment and levied it upon certain property as the property of the defendants is uncontroverted. As to the property so levied upon, the presumption obtains that it was liable to the attachment: *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Abbott v. Gillespy*, 75 Ala. 180. The presumption is not conclusive; and it was permissible for the defendants to show that ²⁰³ the property was not, in fact, subject to levy: *Wilson v. Strobach*, 59 Ala. 488. It is not contended that the approval by the sheriff of the claim bond tendered by Edwards relieves the defendants from liability to account for the property on which the levy was made, nor removes from them the burden of

proving that the property was not subject to the levy. Unaccompanied as the bond was by the affidavit the statute requires, a trial of the right of property was not instituted, and the delivery of the property to Edwards was not thereby authorized: *Walker v. Ivey*, 74 Ala. 475; *Graham v. Hughes*, 77 Ala. 590. The insistence on the part of the appellants is, first, that the property in fact belonged to Edwards; next, that if it did not, and it and all other property which plaintiffs insisted was subject to levy be treated as property of the defendants, it was all less in value than the amount exempt by law; and lastly, if not so exempt, the value as fixed by the court (trying the case without a jury) was too large.

The sale by Stanley & Co., or Nat. Stanley, to Edwards, was of all the property in both places of business in the city of Birmingham, and it is not insisted that defendants owned any other property. The primary question is as to the validity of the sale. The court below, upon the evidence, answered this question negatively, and we are not convinced there was error in the conclusion. Upon this inquiry, we do not deem it necessary to refer to more than one phase of the evidence. We have many times drawn the distinction between a purchase of property in payment of an antecedent debt, and a purchase on present consideration. In respect to the latter, we have repeatedly held that if the intent of the seller was to hinder, delay, or defraud creditors, and the buyer knew of such intent, or was informed of such circumstances as would lead a person of ordinary care and prudence to institute inquiry which, if followed up, would have disclosed the intent, then the transaction is fraudulent, though the vendee may pay an adequate and valuable consideration: *Crawford v. Kirksey*, 55 Ala. 283, 28 Am. Rep. 704; *Lehman v. Kelly*, 68 Ala. 192; *Dollins v. Pollock*, 89 Ala. 351; *Schaungut v. Udell*, 93 Ala. 302. On January 6th, Nat. Stanley purchased the interest of his partner ²⁰⁴ Johnson in the firm assets on an agreement to relieve Johnson from the partnership debts and the payment of seven hundred dollars in money. In the transaction, Hinkle, it was assumed, had no interest, so that the interest of Johnson was one-half. The debts at that time were about two thousand dollars. Assuming Johnson's liability as between the partners to have been one-half, and the bonus paid him to have been seven hundred dollars, we would have seventeen hundred dollars as representing half the value of the property, or three thousand four hundred dollars for the whole on January 6th. The fact admitted in argument for appellants and disclosed

by the evidence, that Edwards knew of this sale, knew that Stanley assumed all liabilities and paid seven hundred dollars excess for Johnson's half interest, is urged by the appellants as disclosing Edwards' want of knowledge that Stanley & Co. were insolvent or in embarrassed circumstances. Dissociated from later occurrences and standing alone, such might be the inference. But when it appears that Edwards claims to have bought all the property two days afterward at two thousand two hundred dollars—or one thousand two hundred dollars less than the estimate placed on it in the transaction between Stanley and Johnson—the inference is reversed. If the assets, as compared with the liabilities, were sufficient to justify the payment of seven hundred dollars premium for Johnson's half interest on the 6th, was it not highly suggestive to Edwards that something was wrong, when, two days later, the same property was offered to him at the reduction named? He must have assumed either that Stanley had agreed to pay more than the property was worth, in which event the argument of the appellants in this aspect falls to the ground, or that some exigency had arisen in two days of sufficient importance to induce Stanley to suffer a large loss. Knowing that in the original trade the assets exceeded the liabilities only by some fourteen hundred dollars, Edwards agrees to pay for the property a sum which exceeded the liabilities only by two hundred dollars. And this sum was to be paid to the debtor in cash (less five hundred dollars to be paid Smith), with no security for other creditors or provision for their payment. When, in connection with these facts, the intimate relations of the parties ~~are~~ are considered, together with the admission by Edwards (deposed to by Bernard) that Stanley continued to draw money out of the business after the sale, we are of opinion the finding of the court below that the sale was fraudulent should not be disturbed.

Eliminating Edwards' purchase, it is next insisted that all the property of the defendants did not exceed in value the amount exempt by law; and the principle is invoked that the sheriff cannot be held liable for failure to levy upon exempt property. This question cannot arise on this record for the reason that in respect to partnership property no exemption can be claimed as against partnership debts. It is expressly provided by statute (Code 1886, sec. 2513; Code 1896, sec. 2039) as follows: "No property, real or personal, held or owned by

partners as partnership property, or purchased with partnership funds for partnership purposes, shall be the subject of homestead or other exemption as against copartners or partnership creditors." As against partnership creditors, Nat. Stanley did not, by virtue of his purchase from Johnson, become the sole owner of the property. There was another partner—Hinkle. True, his interest is said to have been "nominal"; but this was so only as between the partners themselves. In respect to creditors, Hinkle's liability and his joint ownership of the partnership assets were actual and not nominal: *Schlapback v. Long*, 90 Ala. 525. Nor would the result be different if Hinkle had joined Johnson in the sale. Both were insolvent, and the transaction would have been fraudulent as to partnership creditors: *Aiken v. Steiner*, 98 Ala. 355, 39 Am. St. Rep. 58.

In respect to the property levied upon, the fact of the levy, as we have said, imposed, *prima facie*, a liability upon the sheriff to preserve and apply the property to the judgment when rendered. His discharge of the levy upon the mere execution of a claim bond, unaccompanied by affidavit, did not, as we have said, relieve him from this liability. Assuming that Edwards acquired no title by his purchase, the liability of the sheriff for the property levied upon is beyond question.

But the burden was upon the plaintiffs to show the extent of their damage by proof of the value of the property. ²⁰⁸ There seems to have been no special effort to prove the value of the specific property, but one witness (Frank) testifying on the subject, and he in a very indefinite way. The plaintiffs sought to prove, rather, the value of all the property upon which it was insisted the sheriff should have levied, as alleged in the second count, and which, it was claimed, largely exceeded in amount and value that actually levied upon. If there was property subject to levy which the officer neglected to seize, the burden was upon the plaintiffs to show it. The presumption is that sworn public officers have performed their duty, and this presumption obtains until disproved by him who asserts the contrary. Nearly all the evidence adduced by the plaintiffs on this issue relates to the amount and value of the property on hand at the date of the sale from Johnson to Stanley. The highest estimate as of that date is Johnson's, who fixes the value of the property in the First avenue place at two thousand three hundred dollars (stock one thousand four hundred dollars and fixtures nine hundred dollars), and in the Twenty-first street house at thirteen hundred dollars (stock seven hundred dollars and fixtures six

hundred dollars), a total of three thousand six hundred dollars. Frank testifies that he assisted in taking an inventory of the property, including fixtures in the First avenue store, at the time of Johnson's sale, and that its value was about two thousand three hundred dollars. He agrees with Johnson that the stock was worth one thousand four hundred dollars, and the fixtures nine hundred dollars. The estimates of Johnson and Frank relate, it will be seen, to a date six days before the plaintiff's attachment was received by the sheriff, and it is contended for plaintiffs that, having thus fixed the amount and value, the burden was upon the defendants to account for any diminution. If, in a proceeding against Stanley & Co., such an issue was involved, there would be force in the proposition. In such case, the presumption of a continuance of the status would operate against parties having special means, not open perhaps to others, of accounting for any loss or diminution. But the principle can have but limited, if any, application to a suit like the present, where the duty of accounting attaches only as of the time when the officer makes a levy, or should have made one. It was not the duty of the sheriff to account for any discrepancy between the amount of property in existence ²⁰⁷ on the sixth day of January and the amount subject to levy when the process came into his hands. The issue was, not how much Stanley & Co. had owned a week prior to January 12th, but what property there was, subject to levy, on the day the writ reached the officer. To shed light on this issue, it was doubtless competent to prove the recent ownership by defendants of more property than was levied on; but such evidence created no presumption against the officer which would shift the burden of proof. It was merely evidence of a fact, the probative force of which was a question for the jury, or, in this case, for the judge, since a jury was waived, considered in connection with any other evidence tending to corroborate or weaken it.

The evidence of but one witness (Frank) tended to show that all the property included in the sale from Johnson to Stanley was in the First avenue house on the day of the levy. He made no examination, and evidently testified from general appearances. Opposed is the evidence of Edwards, who says that, when he bought (two days before the levy), the property in that store, aside from the furniture and fixtures, amounted to but four hundred dollars in value, and the evidence of the sheriff and his deputy. The sheriff made the levy in the First avenue store, and testified that the cash market value of all the property he

could find there was one hundred and fifty or two hundred dollars. The deputy levied on the Twenty-first street property. It was of small value aside from the furniture and fixtures, both together being estimated, according to the evidence of the sheriff and his deputy, at between two hundred and seventy-five dollars and three hundred dollars. On the whole evidence, we reach the conclusion that the return made by the sheriff on plaintiffs' attachment covers all the property found in both places of business, with the exception of the furniture and fixtures in each.

We reach the further conclusion that the plaintiffs were not damaged by the failure to levy on the furniture and fixtures in the First avenue house. The evidence shows without conflict that after Edwards' purchase he executed a mortgage to secure a loan of one thousand dollars, made on the faith of his possession and ownership of the property. The mortgagee was a purchaser in good faith, for value, without notice of any infirmity in the title, and entitled to protection as such: *Thames v. Rembert*, 63 Ala. 561. It clearly appears that the property mortgaged was not sufficient to secure the debt, so that the plaintiffs lost nothing by the failure to levy upon it. We have held that on such facts the officer is not liable: *Abbott v. Gillespy*, 75 Ala. 180; *Gay v. Burgess*, 59 Ala. 575; *Sedgwick on Damages*, sec. 634.

As regards the furniture and fixtures in the Twenty-first street house, the sheriff should have levied, unless, at the time the plaintiffs' attachment was returned, the property was already under seizure by virtue of older attachments sufficient in amount to absorb the proceeds. But if the levies under the prior attachments had been discharged prior to the return of plaintiffs' attachment, then the mere fact of the existence of such prior attachments, or that they had at one time been levied, cannot excuse the failure to levy: *Bell v. King*, 8 Port. 147.

We are of opinion that the value of the property levied upon was less than that ascertained by the court below, and for which judgment was rendered, and that this appears with such certainty as to take the case without the influence of *Woodrow v. Hawving*, 105 Ala. 240.

Many exceptions were reserved by the appellants to the admission of evidence, but, as they are not (with one exception) insisted upon in argument, we must decline to consider them. The single assignment argued relates to the admission of evidence that Stanley & Co. had not, prior to the sale by Johnson,

taken out a license as retailers. We cannot perceive the relevancy of this evidence. Our statutes prohibiting the sales of liquor without license have no application to such transactions.

The statute regulating the practice and procedure in civil cases in the circuit court of Jefferson authorizes trials without the intervention of a jury, and, when such trials are had, authorizes the conclusion and judgment of the court upon the evidence to be presented to this court for revision on appeal, and, if in this respect this court finds there is error, authorizes a judgment of reversal or remandment to be rendered, or the rendition of such judgment as the trial court ought to have rendered: Pamph. Acts, 1888-89, sec. 7, p. 800. Having reached the conclusion that the plaintiffs were not entitled to recover so large a sum as was ³⁰⁰ adjudged, to avoid protracting the litigation, we have carefully examined the evidence to ascertain for what sum judgment should have been rendered, with a view to the rendition of the proper judgment here. Without discussing the evidence in detail, and after giving precedence to the attachments levied before the attachment of the appellees was levied, and after ascertaining the value of the property on which the levies were made, we are of opinion the appellees were not entitled at the time of the trial to recover a sum exceeding four hundred dollars, and for this sum, with the interest thereon to this day, a judgment will be rendered against the appellants and their sureties on the supersedeas bond, together with the costs of suit in the court below. The appellees will pay two-thirds of the costs of appeal, and the appellants one-third thereof.

Reversed and rendered.

PLEADING—SUFFICIENCY OF PLEA—DEMURRER.—If a plea purports to answer the whole declaration, but answers only a part, it is bad on demurrer: Note to *Emshwiler v. Tyner*, 69 Am. St. Rep. 365.

FRAUDULENT CONVEYANCES—KNOWLEDGE OF PURCHASER.—If property is transferred with a view of defeating the claims of creditors, and the intent is known to the grantee, or could have been known from facts within his knowledge and sufficient to put a prudent man on inquiry, and which, by the use of ordinary diligence on his part, would have led to a knowledge of the fraudulent intent of the seller, the transfer is fraudulent and void as to creditors, although a full consideration is paid: Note to *Fluegel v. Henschel*, 66 Am. St. Rep. 649.

PARTNERSHIP PROPERTY—EXEMPTION.—Partnership property is not exempt from the levy of execution or attachment for the payment of partnership debts: *Alken v. Steiner*, 98 Ala. 355, 39 Am. St. Rep. 58; note to *Russell v. Cole*, 57 Am. St. Rep. 443. A sale of partnership property by one partner to the other cannot entitle the purchasing partner to retain the property as exempt from execu-

tion for the partnership debts. To so hold would be to sustain a transfer which must necessarily result in delaying, hindering, and defrauding partnership creditors: *Aiken v. Steiner*, 98 Ala. 355, 39 Am. St. Rep. 58.

PARTNERSHIP PROPERTY—TRANSFER OF, FRAUDULENT AS TO CREDITORS.—A transfer to one partner by the others of all the partnership property, in consideration of his assumption of the partnership liabilities, cannot defeat the rights of partnership creditors, where the effect of the transfer, by reason of insolvency, or otherwise, is to hinder, delay, or defraud them: *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712. The transfer by one member of an insolvent partnership to the others of his interest in the firm must be treated as a fraud upon the firm creditors: *Franklin etc. Co. v. Henderson*, 86 Md. 452, 63 Am. St. Rep. 524.

SHERIFFS—REFUSAL TO LEVY—LIABILITY—BURDEN OF PROOF.—In an action for a refusal to levy, the defense is always open to the officer that there was no property to be found, liable to seizure, belonging to the judgment debtor named in the execution, but the burden of proof is upon the officer to show there was no property subject to levy: *Second Nat. Bank v. Gilbert*, 174 Ill. 485, 46 Am. St. Rep. 306, and note.

SHERIFFS—FAILURE TO LEVY—LIABILITY—BURDEN OF PROOF.—Where a writ of attachment is placed in the hands of a sheriff to be levied, a bond of indemnity given, and property in the possession of the defendant, apparently subject to levy, is pointed out, the sheriff is *prima facie* liable for a failure to make the levy, and the burden rests upon him to show that the property was not subject to levy: *Mathis v. Carpenter*, 95 Ala. 156, 36 Am. St. Rep. 187. A sheriff and his sureties are liable in damages for the officer's neglect to levy an execution: *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62. The sheriff, however, may defend by showing title in a third person, or that the property has been taken on an earlier attachment: *Denny v. Willard*, 11 Pick. 519, 22 Am. Dec. 389. But he is liable for a deficiency where he has neglected to levy an attachment upon sufficient property to satisfy the debt, where the defendant in the attachment had sufficient property to satisfy the demand, and the sheriff knew it at the time of making the levy: Note to *People v. Palmer*, 95 Am. Dec. 426.

ROBINSON v. PIERCE. *STONE v. ROBINSON. PIERCE v. ROBINSON.*

[118 ALABAMA, 273.]

TRUSTS—TRUSTEE—EFFECT OF HIS BEING CLOTHED WITH LEGAL TITLE—REMEDY OF BENEFICIARY.—In a court of law, the trustee of a trust estate is considered to be clothed with the legal title, and, unless restrained by the terms of the trust, he may convey, assign, or encumber the trust estate. Hence, if the cestui que trust is injured by any such act of alienation, he must resort to a court of equity for relief.

TRUSTS—TRUSTEE—QUANTUM OF ESTATE TAKEN BY. A trustee of an active trust, who is not a bare donee of a power takes, irrespective of the estate which the instrument purports to convey, precisely that quantum of legal estate which is necessary to

discharge the declared powers and duties of the trust—no more and no less.

TRUSTS, ACTIVE—TRUSTEE BECOMES DIVESTED OF LEGAL ESTATE, WHEN.—Whatever may be the limitations imposed by an instrument which creates an active trust, and whatever estate the trustee takes in the beginning, the legal estate in the trustee is divested out of him, and passes into the cestui que trust, upon the instant that the duties and powers of the trust, from any cause, cease to be active, or cease to require a legal title in the trustee.

TRUSTS—POWER TO SELL INVESTS TRUSTEE WITH LEGAL TITLE.—A power to sell an estate in fee, conferred upon a trustee by the terms of his trust, invests him with the legal title in fee, even where the trust to sell is on a contingency.

TRUSTS—TRUSTEE TAKES FEE, WHEN—EFFECT OF CONVEYANCE BY.—If an estate is given to trustees in fee, upon trusts that do not exhaust the whole estate, and a power is super-added which can only be exercised by the trustees conveying in fee simple, the trustees will take the fee; and a conveyance by them will be sustained by the fee in them, and not by the mere power.

TRUSTS—TRUSTEE—CONVEYANCES BY, EFFECT OF.—Except as modified by statute, all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title and vest it in the grantee.

TRUSTS — TRUSTEE — CONVEYANCE — BREACH OF TRUST—REMEDY OF BENEFICIARY.—If land is conveyed in trust for the benefit of the grantor's daughter for life with remainder to certain of her children, a conveyance by the trustee, though made in contravention of the trust, passes the legal title in fee of the premises to the grantee, and the only remedy of the beneficiaries of the trust is to resort to a court of equity to compel the grantee to respect and execute the trust as the original trustee should have done.

TRUSTS — TRUSTEE — CONVEYANCE — BREACH OF TRUST—RESORT TO EQUITY—LACHES.—If land is conveyed in trust for the benefit of a life tenant, with remainder over to such tenant's heirs, and the trustee makes a conveyance in contravention of the trust, the right of the remaindermen to resort to a court of equity for the protection of their interests is open to them at once without regard to the life or death of the life tenant; and a delay for a period of nearly forty years after the breach to seek such redress bars their right, although the life tenant dies within the year prior to the filing of their bill.

John Falconer, in 1847, conveyed certain lands in fee to Thomas Welsh in trust, for the sole use and benefit of his daughter, Mary Jane Robinson, during her natural life, and at her death to the complainants, Robinson and others. The first case was a bill filed by the complainants and appellants, Robinson and others, to enforce a trust in the real estate; and the other two cases were of actions of ejectment brought by the complainants against the defendants, Stone, and Pierce and others, in the respective suits. In the chancery suit, an appeal was taken from a decree holding that the complainants were not entitled to the relief sought, and it was ordered that the bill be dismissed, but that suit was pending in the supreme court, on

application for a rehearing, at the time the ejectment suits were instituted. Subsequently, appeals were taken in the ejectment suits from judgments rendered therein, respectively, in favor of the plaintiffs. The same questions were involved in each of the suits, and they were submitted together in the supreme court.

Pettus & Pettus, W. S. Thorington, Alex. T. London, and Phares Coleman, for Stone and Pierce.

Gunter & Gunter, for Robinson and others.

²⁸⁶ HEAD, J. On the thirtieth day of April, 1847, John Falconer, in consideration of nine hundred dollars paid by Mary Jane Robinson, bargained, sold, and conveyed, by deed in fee, with warranty, unto Thomas Welsh, the lands in controversy, situate in the city of Montgomery, Alabama, "in trust and for the sole and separate use and benefit of the said Mary Jane Robinson during her natural life, and, at her death, to the issue of the said Mary Jane Robinson, by her marriage with her present husband, Seth Robinson, free from all liability for the debts, contracts of her present or any future husband, with the power to bargain and sell and such assurances to make of the same to any person, on request of said Mary Jane Robinson, in writing, and invest the proceeds of the sale thereof in such property as the said Mary Jane Robinson may select, and the same to be held subject, in like manner, to the uses and trusts hereinbefore stated."

On the thirtieth day of January, 1854, as the deed recites, said "Thomas Welsh, trustee for Mary Jane Robinson, for and in consideration of three thousand dollars, to the said Mary Jane Robinson in hand paid by Nathaniel H. Wright, the receipt whereof is hereby acknowledged," by deed in fee, with warranty, granted, bargained, sold, enfeoffed, and confirmed unto the said Nathaniel H. Wright a certain part of said lands. This deed was signed and sealed by "Thomas Welsh, trustee," and by said Mary Jane Robinson. At the same time, Seth Robinson, the husband of said Mary Jane, executed a quitclaim deed to said premises to said Wright. By mesne conveyances from Wright, this property was, in March, 1873, duly conveyed to the defendant, George W. Stone, vesting in him all the title of the said Wright. Immediately after the execution of the Welsh deed to Wright, in 1854, he, Wright, took possession of the granted premises, as rightful owner, and he and those succeed-

ing to his right and possession, including the defendant, Stone, have since held independent and adverse possession thereof.

²⁸⁷ On the first day of June, 1858, the said Thomas Welsh and his wife, by deed, quitclaimed all right, title, and interest in the remaining portion of said lands to said Seth Robinson; and, at the same time, Seth Robinson and his wife, the said Mary Jane Robinson, for and in consideration of three thousand five hundred dollars, paid by Mary C. Pierce to the said Seth Robinson, conveyed the same by deed, in fee, with warranty, to said Mary C. Pierce, who went into immediate possession as owner, and held independent adverse possession thereof until her death in 1889. The said Mary Jane Robinson died in December, 1889.

On the fifth day of August, 1890, a bill was filed in the chancery court by the remaindermen created by the Falconer deed, against the devisees of said Mary C. Pierce and against the said George W. Stone, setting up alleged breaches of trust on the part of Welsh, the trustee, known to and participated in by the said several purchasers from him, and known to said Stone, in that the purchase money was not, in either case, received and invested by Welsh, as trustee, as required by the terms of the trust, but that the same was suffered to be received, and was received, in the one case, by Mrs. Robinson, and, in the other, by her husband; and the bill avers that he, Welsh, died many years ago without leaving any estate, and without ever having received anything whatever for or on account of the said sales of said trust property, and without ever making, and without anyone else making, any reinvestment whatever of the proceeds of either of said sales. The prayer was that complainants be decreed to be entitled to said lands, that the several holders thereof be required to convey the same to them, and that an account of the value of the use and occupation of said property since the death of said Mary Jane Robinson be taken and the defendants decreed to pay the same, and for general relief. The respondents set up, in bar, *inter alia*, laches of complainants, and staleness of demand.

The cause coming on for hearing before us, on appeal, upon consideration of the questions and line of argument then prominently addressed to our attention, we ²⁸⁸ reached the conclusion that the complainants were invested with the legal title to the premises and had an adequate remedy at law, and we accordingly dismissed the bill. Upon the application of respondents for a modification of our opinion, holding that the legal title was in the complainants, the case was again elaborately

argued by counsel, upon briefs, and new considerations brought to our attention, which now convince us that our former opinion was erroneous, in the respect above stated, and that the application for a modification of it ought to be granted. We will proceed presently to give our reasons for this conclusion.

After that decision, real actions were instituted by the complainants in the circuit court, and prosecuted to verdicts and judgments in their favor; and from those judgments appeals were prosecuted to this court, and are now before us. We have before us, also, the said application for a modification of the former opinion in the equity cause.

The opinion we now hold is that the conveyances executed by Welsh, the trustee, though infected with palpable breaches of trust, apparent upon the faces of the conveyances themselves, were yet, in the view of a court of law, valid executions of the trust, passing the legal title in fee to the premises to the grantees, respectively, leaving a resort to a court of equity as the appropriate and only remedy of the beneficiaries of the trust for redress of the breaches of trust committed by Welsh and his vendees.

The first questions are: What title did Welsh, as trustee, have when he conveyed to Wright and Pierce? Was it a fee or less estate? If there is an axiom in the law, it must be regarded as axiomatic, in the construction of active trusts, that the trustee (not a bare donee of a power), irrespective of the estate the instrument purports to convey, will take thereunder precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of the trust, no more and no less; so that if the instrument imports a larger estate than is thus essential, it is cut down to the measure of the exigencies of the trust; as where the conveyance to the trustee is in fee, and the trusts require ²⁸⁰ only a life estate in the trustee, only a life estate is vested in him; and if the conveyance is, in terms, of a life estate, and a fee in the trustee is necessary, his estate is expanded or enlarged into a fee; or, to quote Mr. Lewin: "1. Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied"; and "2. The legal estate limited to the trustee shall not be carried further than the complete execution of the trust necessarily requires." All commentators and adjudged cases, including a number of our own decisions, concur in these propositions; and, as the principle is not disputed in this case, we will not take the time to cite them. It is also a rule, upon which all are agreed,

that whatever be the limitations of the instrument, and whatever estate the trustee takes, in the beginning, the legal estate in the trustee is divested out of him, and passed into the cestui que trust, upon the instant that the duties and powers of the trust, from any cause, cease to be active, or cease to require a legal title in the trustee. Again, it will not be questioned that a power to sell the estate, in fee, conferred upon the trustee by the terms of the trust, invests him with the legal title in fee; for the principle is not only self-evident, but it is so expressly declared in all authorities upon the subject. And this is so, even where the trust to sell is on a contingency: 1 Lewin on Trusts, 213 (3); *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183; as where the sale is to be upon the request of another person, and the trustee was never actually called upon to exercise the power of sale: 27 Am. & Eng. Ency. of Law, 115, note. In this volume, beginning at page 107, will be found a full discussion of these subjects, collecting a great many authorities, with copious extracts from adjudged cases; and, in a note of over thirty pages, in 19 Am. St. Rep. 266, Mr. Freeman sums up the law, collating scores of cases, upon well nigh every question which can arise in reference to estates of trustees, their powers and duties and the manner and effect of their execution, supporting the principles above laid down and others which will be relied upon in this opinion.

It is also laid down, and nowhere disputed, that: ²⁹⁰ "Where an estate is given to trustees in fee, upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees conveying in fee simple, the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and not by the mere power": 1 Perry on Trusts, sec. 316. This describes the Falconer deed in question. The conveyance to Welsh was, in terms, in fee. The active duty, apart from the power to sell, was to preserve the equitable separate estate of Mrs. Robinson during her life. If the deed had stopped there, Welsh would have taken no greater estate than for her life, for that would have limited the necessity for a trust; and such a trust not affecting the estate in remainder, the legal estate in remainder in fee, dependent upon the precedent life estate, would have at once vested in the designated remaindermen by operation of the statute of uses. But there was the superadded power to sell the fee, and this retained the entire estate in the trustee; and in him that title must have remained until he divested himself of it by

grant; or, not having granted it, until the death of Mrs. Robinson, when her request for the exercise of the power would have become impossible; or until, by the death of the trustee, or the processes of a court of equity, in the exercise of its supervision of trustees, or by contract of all parties concerned, the estate should have been devolved upon another.

Then, the inquiry arises, What has become of this fee simple title, so vested in Welsh, the trustee? The case shows that during the life of Mrs. Robinson, upon her request, in writing, manifested by her signing and sealing the deed in the one case, and actually joining in the deed in the other, Welsh, the trustee, upon valuable considerations, by his deeds, respectively, granted, bargained, sold, and conveyed to Wright and Pierce, respectively, his entire title and estate in the premises; in the one case, with the usual covenants of warranty, et cetera, and the other by quitclaim. In the deed to Wright he expressly declares upon its face, that he conveys as trustee; in that to Pierce, the law imputes the act to that capacity for the reason that he had no pretense of ²⁹¹ connection with the land, or estate therein, except as trustee. The law to this effect is not disputable: Doe ex dem. Gosson v. Ladd, 77 Ala. 223; Tyler v. Herring, 19 Am. St. Rep. 292, note. See full discussion of the question in Gindrat v. Montgomery Gas Light Co., 82 Ala. 596, 60 Am. Rep. 769.

Mr. Lewin (1 Lewin on Trusts, 221) says: "It may be stated as a general rule that the legal estate in the hands of the trustee has, at common law, precisely the same properties and incidents as if the trustee were the usufructuary owner." He proceeds to give numerous illustrations of the rule, and, reaching page 225, says: "A trust estate, whether real or personal, may, at law, be conveyed, assigned, or encumbered by the trustee like a beneficial estate; and, if there be cotrustees, each may exercise the like powers of ownership over his own proportion. Thus, if lands be vested in trustees as joint tenants, each may, at law, receive the rents, and each may, at law, sever the joint tenancy by a conveyance of his share." He also shows that a devise by the trustee of the trust estate will at law pass his title to the devisee. But, of course, all such dispositions are subject to the equitable rights of the cestui que trust. Thus, the same author says, at page 572: "In a court of law, the trustee, as the absolute proprietor, may, of course, exercise all such powers as the legal ownership confers; but, in equity, the cestui que trust is the absolute owner; and the question we have to consider in this place is, how far the trustee may deal with the estate without render-

ing himself responsible in the forum of a court of equity." He then proceeds to set forth, at length and in detail, the rights and liabilities of the trustee in a court of equity.

Mr. Perry says: "As a general rule, the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents as if the trustee were the absolute beneficial owner. The legal title vests in him, together with all the appurtenances and all the covenants that run with the land. The trustee may sell and devise it, or mortgage it, or it may be taken on execution. It may be forfeited, and it will escheat on failure of heirs, and so it will descend to heirs on the death of the trustee. All these properties ²⁰² and incidents attach to the legal estate at common law, whether in the hands of a trustee or of an absolute owner; but these incidents do not generally interfere with the proper execution of the trust, for all conveyances and all encumbrances made or imposed upon the estate by the trustee, for other purposes than those of the trust, or in breach of the trust, are utterly disregarded by a court of equity, whatever may be the effect of such conveyances or encumbrances in a court of common law. And as the trustee may in a court of law, as a general rule, deal with the legal estate in his hands as if he was the absolute owner, so the cestui que trust in a court of equity may deal with the equitable estate in him; he is the beneficial and substantial owner, and in the absence of any disability—that is, if he is *sui juris*—he may sell and dispose of it; and any legal conveyance of it will have in equity the same operation upon the equitable estate as a similar conveyance of the legal estate would have at law upon the legal estate": 1 Perry on Trusts, 3d ed., sec. 321. Hill on Trustees, marginal pages 175, 282, 283, states the same doctrine; Washburn on Real Property, volume 2, marginal page 482 et seq., the same. See, also, Tiffany & Bulard on Trusts and Trustees, 824 et seq.

In *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183, Huntington executed to Howell a deed, in trust, to secure a debt due to Harrell, and secondarily to secure debts due to the Branch Bank at Mobile. Without the debts to the bank being paid, the trustee, in plain contravention of the trust, executed to the trustor, Huntington, a quitclaim deed in consideration of the payment of the Harrell debt. Afterward, in strict pursuance of the power of sale contained in the trust deed, he, the trustee, sold the property to the plaintiff, and executed to him his deed thereto. The court held that the quitclaim of the trustee to the trustor divested the title of the former, and revested

it in the latter, and that the action of trespass to try titles, founded on the subsequent deed of the trustee to the plaintiff, under the power, could not be maintained. Chief Justice Collier discussed the subject at length, saying, *inter alia*, that: "A trust estate, whether real or personal, may, like a beneficial estate, ²⁹³ be conveyed, assigned, or encumbered by the trustee at law. As the dry legal estate in the hands of the trustee is affected by the operation of the law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the legal privileges, and subjects him to all the legal burdens, that are incident to the usufructuary possession. Thus he may sue at law respecting the trust estate; the cestui que trust, though the absolute owner in equity, is regarded in a court of law in the light of a stranger": See, also, *Herbert v. Hanrick*, 16 Ala. 581.

In *McBrayer v. Cariker*, 64 Ala. 50, Chief Justice Brickell said: "The general rule, insisted on by appellant, may be conceded, that at law the trustee, clothed with the legal title, unless restrained by the terms of the trust, may convey, assign, or encumber the trust estate; and, if the cestui que trust is injured, he must resort to a court of equity for relief": Citing *Huckabee v. Billingsly*, 6 Ala. 414, 50 Am. Dec. 183. But in that case the conveyance of the trustee, relied upon, was made after the active duties of the trustee, under the terms of the deed, had terminated, if, indeed, the trust had ever been an active one—a question which the court said it was unnecessary to decide; and it was correctly held that the trustee had no title to convey at the time he executed his deed. The authorities are uniform that after all power in the trustee to perform an active duty, under the peculiar terms of the trust, ceases, his title, which was commensurate only with the duty, also ceases, and thereafter he can convey none to another: *Comby v. McMichael*, 19 Ala. 747; *Doe ex dem. Gosson v. Ladd*, 77 Ala. 223.

In *Hairston v. Dobbs*, 80 Ala. 589, the executor of a will was given "full power to purchase or sell property he may think necessary or proper, . . . or to dispose of any property for the benefit of the estate." He sold and conveyed lands of the estate to Dobbs. Held, that though the conveyance may have been made in payment of an individual debt due by the executor to Dobbs (a palpable breach of trust), yet the conveyance passed the legal title to the latter, and the devisees ²⁹⁴ could not, for that reason, maintain ejectment against that deed. The court confined the devisees to their appropriate remedies for the

breach of the trust. And hence these devisees were remaindermen.

Mr. Freeman, in his note to *Tyler v. Herring*, 19 Am. St. Rep. 267, citing many authorities, states the rule thus: "Where the rules of law upon the subject have not been modified by statute" (which he subsequently shows is the case in New York, Michigan, Wisconsin, Minnesota, Kansas, California, and Dakota) "all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title and vest it in the grantee. This conclusion," he says, "necessarily followed from the refusal of the common law to recognize trusts or equitable titles, for unless such trusts or titles were to be considered, there was no reason why the trustee should not convey to whomsoever he pleased. His conveyance was, therefore, valid at law, and the rights of the beneficiary could be protected only by his seeking redress in equity, and compelling the grantee to respect and to execute the trust, as the original trustee should have done." As stated above, in New York and the other states mentioned, the rule is changed by statute, and it is declared that where the trust is expressed in the deed to the trustee, creating the estate, every transfer or other act of the trustee in contravention of the trust is absolutely void. Discussing these statutes, Mr. Freeman observes: "The doubts most likely to arise concerning the signification of these statutes are: 1. Do they mean that inhibited conveyances shall be deemed void at law, as well as in equity? and 2. If void both at law and in equity, are they also void, when upon their face, they appear to be made pursuant to the authority conferred on the trustee, and the fact of their being in contravention of the trust must 'be established by extrinsic evidence, and knowledge of this fact cannot be brought home to the grantee or his successors in interest?" He then proceeds to the New York decisions construing the statute, holding the inhibited conveyances to be void, both at law and in equity, against purchasers with ²⁹⁵ or without notice; that the title, powers, and duties of the trustee are unaffected by the conveyance, and he continues to be trustee to the same effect as if the conveyance had not been made. A case—the counterpart of *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183—is cited where it was held, under the operation of the statute, that the reconveyance to the trustor by the trustee was absolutely void: See the cases collated in the note supra. We have no such statute. The common law upon the subject obtains with us in all its vigor, except as to the descent of trust estates.

Notice the analogies which we meet with in almost every day experience. A mortgagee is invested with the legal title to land, in trust, for the sole purpose of securing his debt. His power to sell for that purpose is required to be exercised after strictly defined formalities; yet his bare deed to the premises, or a transfer of the mortgage with apt words to convey the land, passes the legal title to the land, though there be entire disregard of the prescribed formalities. And if the condition of the mortgage be not performed by the mortgagor to the very day, payment of the mortgage debt thereafter (until the rule was changed by a recent statute in this state) did not operate to re-transfer the title to the mortgagor; and his only remedy was in equity. A vendor of land, who receives full payment of the purchase money, and puts the purchaser in possession without a conveyance, stands as a constructive trustee of the vendee, and, clothed with the dry legal title, may eject the vendee at law. The vendee's only remedy is in equity. A trustee of an express trust, purchasing at his own sale, commits an open and conclusively prejudicial breach of his trust, yet his purchase discharges the express trust, and converts him into a constructive trustee, of which character the cestuis que trust may avail themselves by a proceeding in equity seasonably begun—within two years, under our rulings, unless there be special circumstances justifying greater delay. Countless instances might be given demonstrating the universal rule of the common law that trustees clothed with the legal title by virtue of the ²⁹⁶ trust, and having and claiming no other estate in the premises and professing to convey no other, pass that title by their grants, without any regard, in a court of law, to the nature, object, or purposes of the trust, or conformity to their requirements. Indeed, it required a statute in this state to prevent the descent of that title to the heirs of the trustee: Code 1886, sec. 1848; Code 1896, sec. 1044. In the objects and requirements of the trust are centered the equitable rights of the cestuis que trust, and in a court of equity alone can they enforce them or redress their breach.

A moment's reflection discovers, as a logical necessity, that the very doctrine itself of the validity of trustees' conveyances, in a court of law, implies its application to conveyances in contravention of the trusts; for, if a conveyance be in conformity to the trust, no question of its validity can possibly arise. It is absolutely valid and unassailable, both at law and in equity. And it seems needless to argue that, so far as the validity of the conveyance in a court of law is concerned, it is wholly indifferent

how the breach is manifested, whether shown upon the face of the trustee's deed, or to be established by extrinsic averment and proof. The breach, whatever its nature, being immaterial, as affecting the legal conveyance, its existence or nonexistence is not a matter of inquiry. Thus, it is impossible to find a case anywhere where the trustee was *sui juris* and was confessedly clothed with the legal title, and his deed was not immoral and void, as offensive to public policy, that his conveyance was assailed, except because it was in contravention of the trust; and in every such case at law which our research discloses (and we have spared no pains, in that behalf), with one exception, to which we will refer, the parties complaining were remitted to their remedies in equity. See the Alabama cases above referred to; also the numerous authorities in point collected upon the briefs of counsel; to which we add *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Coxe v. Blanden*, 1 Watts, 533, 26 Am. Dec. 83; *Reece v. Allen*, 5 Gilm. 236, 48 Am. Dec. 336; *Gale v. Mensing*, 29 Mo. 461, 64 Am. Dec. 197, and extended note; *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328.

²⁹⁷ The exception referred to is the doctrine of some Missouri and Mississippi cases, and perhaps of one or two other states, that when a trust deed to secure debts confers a power of sale to be exercised after giving a prescribed notice, the notice is a condition precedent to any conveyance of the legal title by the trustee: *Ohnsburg v. Turner*, 87 Mo. 127; *Enochs v. Miller*, 60 Miss. 19. It is familiar to this court that such is not the law in this state, as settled by *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183, and many subsequent analogous cases. With us, such an irregular sale is voidable, and the equity of redemption, without regard to the statutory right of redemption, will continue until enforced or barred by laches. In *Robinson v. Cahalan*, 91 Ala. 479, there was a fatally defective execution of the power of sale in a mortgage on account of nonconformity to the prescribed formalities as to notice, et cetera, but a deed was made to the purchaser by the mortgagee; and it was held that this deed, although not a foreclosure of the mortgage, for the want of the prescribed notice, et cetera, passed the legal title of the mortgagee to the purchaser, and on that deed the purchaser recovered, in an action of ejectment.

The rule is universal that upon breach of trust by a trustee, howsoever manifested, the cestui que trust may affirm or disaffirm the breach at his election. For instance, no one would doubt for a moment the equity of a bill filed in due season by a

cestui que trust, against the trustee, who, holding the legal title, sold and conveyed to a purchaser, both of whom engaged in misappropriating the purchase money, and against such purchaser, affirming the sale and conveyance, and electing to hold the trustee and purchaser responsible for the misappropriation and to have the money reclaimed and the same laid out, under the direction of the court, in other property upon the same trusts, securing its payment into court, or to another trustee appointed by the court, by a lien on the land conveyed to the purchaser. Suppose a demurrer to such a bill, objecting that complainant had his remedy at law, in that the breach of the trust rendered the sale and conveyance to the purchaser void at law, and that his only ²⁰⁸ remedy was to take back the land, what would be the ruling upon the demurrer? To ask the question is to answer it. The law prescribes no fixed, unalterable consequence of a breach of trust, committed in the disposition of a trust estate. The remedies, in equity, of the cestui que trust, are various and subject to his election. He may, we repeat, affirm the breach, submit to the conveyance, and elect other redress against the trustee and purchaser. If an infant, the court may elect for him. The remaindermen, in this cause, may have deemed the sales advantageous to them, by reason of their power to have the purchase money brought into and secured by the court of equity for their ultimate enjoyment; charging the payment of the sum, not only upon the trustee and purchasers, personally, but upon the lands inequitably disposed of by the trustee. To determine that the breach of trust is, of itself, conclusive of the invalidity of the sale, would be to determine that the only recourse of the cestui que trust is to reclaim the land. If the sale and conveyance are to be treated as nullities, then, although the lands may have sold for a large price, or may have enormously diminished in value since the sale, or, being valuable principally for their improvements, the improvements may have been destroyed after the sale, without fault of the purchaser, yet the benefits of these casualties will be conferred upon the culpable purchaser, by securing him exemption from the restoration of the original agreed purchase money to its legitimate channels, and compelling the cestui que trust to take the land, only, in its denuded or valueless condition. Of course, the cestui que trust may, by his bill, elect to annul the legal conveyance and reclaim the land, instead of other redress. These elections cannot, of course, be made in a court of law.

Again, were we to hold that the Wright and Pierce deeds are void, because of the 'breaches of trust apparent upon the deeds themselves, we would presuppose that the recitals of payment of the purchase money to Mrs. Robinson, in the one case, and her husband, in the other, conclusively establish, as matter of law, beyond ²⁹⁹ all issue, investigation, or inquiry, that there was a substantial misappropriation of the purchase money, amounting to a breach of trust. And not only this, but that they conclusively establish, as matter of law, beyond all issue, investigation, or inquiry, that the purchase money took the direction indicated by the recitals, without any act of omission or commission on the part of the remaindermen, or either of them, estopping them, in equity, to impeach the transactions. Although the purchasers and trustee, or their representatives, may stand ready and able to aver and prove that the purchase money was actually, honestly, and judiciously invested in other property upon the same trusts—in slaves, it may be, who were lost by death or emancipation; or in stocks or bonds which went into the hands of the trustee; or even in lands, with all the necessary muniments of title—or though they be ready and able to aver and prove that the transactions took the shape they did, by the express consent and request, in writing, it may be, of all the remaindermen, yet the mere circumstance that the deeds recite payment of the money to Mr. and Mrs. Robinson forever precludes them—forever shuts them out from all opportunity to explain and show that the trust requirements were, in fact, honestly and judiciously carried out, or that the wishes and desires of the remaindermen, expressly made known, were honestly observed. A practical test: Suppose the remaindermen had, within a reasonable time after the sales, filed their bill to redress the breaches of trust indicated by the recitals in question, electing the nature of relief deemed most advantageous to them, to which the trustee and purchasers answered or pleaded in bar a due reinvestment, such as we have above supposed, or an act of clear estoppel, as supposed, would any court hold that such answer or plea, established by proof, would not have defeated relief? Most assuredly not. See the consequences of such a rule: It will not be contended that a deed by a trustee, whose recitals show a breach of trust, possesses any other or greater invalidity than one whose recitals show due conformity to the trust, but which, upon extrinsic proof, is shown to have been executed in breach ³⁰⁰ of the trust, participated in by both the trustee and purchaser. The only difference is one of evidence. In the one

case, the recitals are prima facie evidence of the breach, casting the burden of proof upon the purchaser; in the other, they are prima facie evidence of conformity to the trust, casting the burden of proof upon the cestui que trust. The breach being established, in either case its effect upon the deed is precisely the same. What that effect is, as we have already seen, equity opens a wide door to the injured cestui que trust to determine by his election. He cannot be forced to treat the conveyance as void, and take the land, or have it secured for him when his right in possession accrues; for to do so would deprive him of his right to elect other redress which might secure to him much larger benefits. If the deed is a nullity, the purchaser thereby having no legal or equitable rights under it, this right of election of the cestui que trust would, as we have said, be excluded; for a party cannot ratify or affirm a conveyance absolutely void, conferring no right, legal or equitable, and elect to take other rights, as growing out of it, more burdensome, it may be, to the opposite party. It would require a new contract, in such a case, to confer any right other than the right to reclaim what the opposite party may have acquired possession of under the void deed, together with such damages as might be legally incident to such wrongful possession. To state another practical case: The deed recites due conformity to the trust. A bill is filed alleging that the recitals are false; that the purchase money was, in fact, paid by the purchaser to the life tenant and her husband, instead of to the trustee, who alone was authorized to receive it; and praying for such lawful redress as the complainant, as cestui que trust, might elect and claim. Thus, upon the principle that a deed is void because of the breach of trust, we would have a bill which showed, by its allegations, that the deed was absolutely void from its inception; and, unless the bill was so framed as to justify a decree canceling the deed as a cloud upon the complainant's title, it would go out of court for want of equity. Again, the rights of the parties in reference to the verity of the recitals must be correlative.³⁰¹ The trustee is the embodiment, so to speak, of the cestuis que trust. Through him they are parties to the deed. They are separate from him, and can assail his acts only in equity. If recitals showing a breach are conclusive as to collorary, they are conclusive when they show conformity, thus excluding, in the latter case, all redress.

A purchaser from a trustee, in contravention of the trust, in no sense becomes thereby an express trustee. He becomes a trustee in invitum, by construction of law. He is a constructive

trustee. He holds actually in his own right, and in hostility to the world; but a court of equity, as Judge Story puts it, will "force a trust upon his conscience," and compel him to perform it or answer for its fruits: 2 Story's Equity Jurisprudence, sec. 1257; 2 Washburn on Real Property, sec. 21, marg. p. 177; Hill on Trustees, marg. p. 144; 1 Perry on Trusts, sec. 217, 241; 2 Pomeroy's Equity Jurisprudence, sec. 1048; *Smyth v. Oliver*, 31 Ala. 39. A resulting trust, though by no means an express one, because not declared in the deed out of which it arises, approaches more nearly thereto, in that it rests upon a presumed intention, from which results the rule that the purchase money must have been paid at the time of the purchase; whereas, a constructive trust, like the present, is supported by no such presumption. It is entirely in invitum, and is raised and enforced by a court of equity as a principle of justice. It has attached to it none of the attributes of an express trust. The purchaser is charged for breaking up the trust, and not because he has agreed to execute it.

In view of these considerations, we are compelled to hold that the legal title passed by the Welsh deeds to Wright and Pierce, and that the remedy of the complainants was alone in equity, upon bill filed in due season.

It follows from what has been said that the counsel for the complainants, had they been in season, properly conceived their remedy when they filed the bill in equity.

But that bill was properly dismissed by the chancellor, and the dismissal affirmed by this court, because of the great staleness of the demand sought to be ³⁰² made the basis of relief. The court was open to the complainants from 1854 in one case, and 1858 in the other, to obtain the relief they have been entitled to, or ever could have become entitled to—the identical relief (assuming the same election) sought by the bill in this case. The fact that by the terms of the Falconer trust the complainants could have had no possessory right until the death of Mrs. Robinson, who was the life tenant, cannot possibly affect the question. It is unquestionably true (for it is the settled rule everywhere, saving what shall be said of *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73, and cases following it) that one having a legal title entitling him to a possessory action upon the falling in of a precedent particular estate is not affected by any lapse of time, howsoever great, until the particular estate falls in, by which event he, for the first time, becomes entitled to his action. There can, it would seem, upon

principle, and certainly so by the great weight of authority, be no disseisin of a remainderman having the legal title in remainder in himself until his right of possession accrues, for until then he is without remedy of any sort against any trespasser or adverse holder, except the right in equity to stay waste and the like. But here these complainants were divested of all title by Welsh's execution of the trust. Their estate was gone. Neither the death of Mrs. Robinson nor any other event would or could have vested in them any estate whatever growing out of the muniments of title. If there was, in the execution of the trust, such a breach committed by Welsh and his vendee as is alleged its effect was, as we have shown, to create in the complainants an independent, substantive cause of relief for being made whole against the consequences of the breach, to be worked out through the court of chancery according to such recognized equitable right and remedy of redress, in such cases, as the complainants might, by their bill, elect. Upon establishing the breach, they could have affirmed the sales, and held the guilty parties to a proper accounting therefor, and disposition of the purchase money, or they could have disaffirmed the sale, and by decree obtained vacation of the conveyances and restoration of the estates in the land to the ³⁰³ status and condition in which the Falconer trust deed would have left them. It is, then, necessarily true (assuming election of the last-named relief) that the only right in respect of the land which the complainants, at the time of Welsh's execution of the trust, or ever afterward, either before or after the death of Mrs. Robinson, could have asserted, was this right to sue in equity to obtain an estate, by restoration, by decree, of the original status. This done, and if the trust still remained unexecuted at the death of Mrs. Robinson, her death would have rendered its execution impossible; there would have been no longer necessity for retention of the legal title by the trustee, and the legal estate in fee would have vested in the complainants upon which they could then have maintained their possessory action, either by petition to the chancery court, in the cause where their title was established, to be let into possession, or by real actions at law as they might have chosen, and no lapse of time (unless the trustee had suffered himself to be disseised for a period sufficient to bar him, thereby barring all *cestuis que trust*) occurring during the life of Mrs. Robinson could have affected their right of recovery. These possessory rights, it is manifest, did not and could not come into existence until, as independent, substantive equities,

they should be sued for and obtained in a court of equity, and that remedy was open, immediately upon the commission of the breach of trust, to precisely the same extent and effect as after the death of Mrs. Robinson. A perfect bill filed before her death would have been in the identical words of one filed after that event. It would not have been even necessary to ask, in the bill, for a writ of possession, for that could be done by petition to the chancellor after passing the decree establishing the complainant's estate and right of possession, suggesting and showing the death of the life tenant. The suit in equity is for the purpose of acquiring an estate which will give a possessory right enforceable by action of law, at the time which, by the effect of the grants as they are decreed to exist, such right would arise. The power of the chancellor, upon establishing this estate, on petition, to put the complainants in possession, is ³⁰⁴ purely auxiliary, incidental—not the primary purpose of, nor forming a part of the equity of, the bill. The question of when, or on what contingency, the complainants may become entitled to possession, cannot possibly concern the relief sought by the bill.

Let us illustrate by a perfectly plain case: One having (we will say) a vested legal estate in remainder in lands dependent upon a precedent life estate, is, by fraud and deceit, induced to sell and convey his estate to another, pending the life estate. Here, we observe, his estate is, by his deed, entirely gone—destroyed. But there grows out of its destruction, by reason of the fraud, a right in him, at his election, to confirm the fraud and sue for damages in the equitable action of deceit, or, repudiating the transaction, to file a bill in chancery for rescission and restoration to his estate. It is manifest that the remedy chosen is open to him at once, without regard to the life or death of the life tenant. If he elects the remedy in chancery, his object is to get back his title, it matters not when his right of possession may accrue, for, until he is restored to his title by a court of equity, he can never have a right or action of possession at law. His restoration to his estate, established by decree years before his possessory period, is just as available to him, for all purposes, as if so established after that period. The question of the time or event of the possessory right is utterly immaterial. No one would contend that a party thus alleged to be defrauded could lie by for thirty or forty years, either before or after the life estate falls in, and then file a bill to rescind his conveyance on account of such alleged fraud.

The briefs on file contain an ample collation of the authorities on the subject we are discussing. Though the last Alabama case on the subject (*Lowery v. Davis* (June, 1890), 8 So. Rep. 79) seems to commit this court irrevocably to the much criticised and doubtful, if not plainly erroneous, doctrine of *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73, yet the integrity of that decision is by no means essential to the correctness of the conclusion declared in this case. There (as in the two subsequent cases which followed that decision—*Lansden* 305 v. Bone, 90 Ala. 446, and *Lowery v. Davis*, 8 So. Rep. 79), the attempted sale of the reversionary estate was absolutely void—the legal title, according to the muniments, continued unbroken in the reversioners down to, and after the death of, the life tenant—and yet, because (as it was held) the void deed, professing to convey the reversion, cast a cloud upon the reversioners' title which they could have gone into equity to remove, and because (as was held) the purchase money paid by the purchaser at the void sale of the reversion having gone into the hands of the personal representative of the deceased owner of the lands through the medium of the void sale, and by him applied to the payment of the debts of such deceased owner, an equitable estoppel was created upon the reversioners, in whom the legal title resided, to claim the land against the void purchaser without paying back the purchase money (whether with or without interest being pretermitted by the decision), it became the duty of the reversioners, within twenty years (although they held the legal title, with no power whatever to enforce it until their right of possession accrued by the falling in of the life estate), to file their bill for a redemption, so to speak, from the void sale, tendering to the purchaser the purchase money, and to have the cloud removed from their title; and, having failed so to sue within twenty years, notwithstanding the continuance of the life estate, they were barred to assert their title after the life estate fell in. Here, in the case before us, after the trustee executed the trust, the remaindermen had no title and no possibility of becoming invested with one, except by suing in equity to acquire it, based upon the independent cause of relief conferred by the breach of trust. It is to this equitable proceeding to acquire a title that staleness of demand is pleaded, and to disallow the defense would be to overrule that great and invaluable principle of equity which has stood for centuries requiring the suitor to be diligent. What conceivable reason can there be for exempting a person from this rule of diligence who sues in equity,

to acquire an estate in remainder or reversion, any more than one suing in equity to acquire an estate in possession? His decree, when obtained, establishes ³⁰⁶perpetually his title, entitling him to maintain his action for possession whenever the event entitling him to possession transpires; and no lapse of time after recovery of the decree, and before the possessory right accrues, could affect his right to recover possession upon the happening of the latter event. The harshness and injustice of a contrary rule would work untold detriment. Here, the complainants, professing no right but that of an equity capable, at any time within twenty years, of enforcement, call upon the respondents to answer and make proof, if they would defend themselves, against that equity, alleged to have grown out of transactions in pais occurring nearly forty years before.

That the complainants' right to file their bill at any time after the commission of the alleged breach of trust was perfect cannot be questioned. A case strongly illustrative (saying nothing of our own decisions cited upon briefs) is that of *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438. There a trust deed vested an equitable estate in lands in remaindermen. The trustor and trustee conveyed, in contravention of the trust, under a decree of court fraudulently obtained. The remaindermen filed their bill, pending the life estate, to have the fund properly restored and reinvested for their ultimate use, when their right in possession would have accrued, and the relief was granted.

We think there can be no doubt that the dismissal of the bill was supported by the staleness of the demand.

The application for modification of our former opinion in the equity case is granted so as to conform to the views herein expressed. In each of the law cases the judgment will be reversed and the cause remanded.

Brickell, C. J., not sitting.

COLEMAN, J., dissented. After calling attention to the fact that, within less than a year after the death of the life tenant, the complainants, both by suits in ejectment and by a bill in chancery, instituted proceedings to assert their rights under the deed made by John Falconer, he said: "It is not pretended that any conduct or word of theirs has induced action on the part of the defendants, or that they have been guilty of anything which authorizes the application of the doctrine of estoppel. It is not pretended that the defendants are entitled to protection as innocent purchasers. Notwithstanding the provisions of the deed of trust for their benefit, and that no principle of estoppel arises, and that defendants are not innocent purchasers, and that plaintiffs instituted proceedings within a year after the ter-

mination of the life estate to enforce their rights, the decision of this court is that they are without remedy, either in a court of law or equity. However plausible and specious the reasoning, the conclusion reached demonstrates its unsoundness and injustice. My opinion is that the deed of the trustee to defendants, showing upon its face that it was not made in accordance with the power vested in the trustee, but in direct violation of that power, did not divest the estate of the remaindermen, and that upon the falling in of the life estate, under the facts, upon the plainest principles of justice they were entitled to assert and recover the estate given to them by the conveyance of their grandfather. The authorities are numerous, also, which sustain this view, and which can be found in the briefs of counsel representing the plaintiffs."

TRUSTS—TITLE OF TRUSTEE.—The estate granted to a trustee will be treated as an estate in fee, if such construction is necessary for the purposes of the trust. It is measured and limited by the trust created: Note to Melick v. Pidcock, 6 Am. St. Rep. 909. A trustee, at common law, is regarded as the owner of the land, the legal estate in his hands having precisely the same properties and incidents that it would have were he the usufructuary owner. Equity also treats him as the legal owner, but it compels him to use the trust property for the purposes declared. A conveyance by the trustee passes the legal title to the grantee: Gale v. Mensing, 20 Mo. 461, 64 Am. Dec. 197, and note.

TRUSTS—CONVEYANCE IN CONTRAVENTION OF.—Except as modified by statute, all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title and vest it in the grantee: See monographic note to Tyler v. Herring, 19 Am. St. Rep. 267, on sales and conveyances by trustees. A conveyance by a trustee, even though made in violation of the trust under which it is held, conveys the legal estate. He may convey the legal title so as to enable the alienee to maintain ejectment: See extended note to Gale v. Mensing, 64 Am. Dec. 199, on the effect of a conveyance by a trustee.

TRUSTS—CONVEYANCE IN CONTRAVENTION OF—REMEDY OF BENEFICIARY—LACHES.—A trustee's conveyance being valid at law, though made in contravention of the trust, the rights of the beneficiary can be protected only by his seeking redress in equity and compelling the grantee to respect and to execute the trust, as the original trustee should have done: Note to Tyler v. Herring, 19 Am. St. Rep. 267. But this must be done without laches on his part: See monographic note to Day v. Brenton, 63 Am. St. Rep. 475, on when beneficiaries are bound by the acts of trustees in contravention of their trusts, and showing what periods of time have been considered a sufficient delay to constitute laches on the part of a cestui que trust. Compare note to Bell v. Hudson, 2 Am. St. Rep. 799. A purchaser from a trustee with notice takes the property impressed with the trust, and his position is in no respect better than that of his vendor: Note to Day v. Brenton, 63 Am. St. Rep. 469.

**LOUISVILLE & NASHVILLE RAILROAD COMPANY v.
NASH.**

[118 ALABAMA, 477.]

ATTACHMENT.—THE SITUS OF A DEBT FOR THE PURPOSE OF GARNISHMENT is at the domicile of the creditor, and not that of the debtor.

ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—CONFLICT OF LAWS—JURISDICTION.—The courts of one state do not have, and cannot acquire, any jurisdiction to attach and condemn a debt due to a nonresident and payable in the state of his residence, by service of process on his debtor as garnishee, in the absence of personal service within the state of suit on the creditor, or his voluntary appearance.

ATTACHMENT—GARNISHMENT—DUE PROCESS OF LAW.—The garnishment and condemnation of a debt due to a nonresident, without personal service within the state of suit on the defendant or owner of the debt, or his voluntary appearance, is without due process of law. The question is not one of jurisdiction over the garnishee, but one of jurisdiction over property situated without the state, and, through the seizure of such property, over the owner thereof.

CONFLICT OF LAWS—JURISDICTION OVER PERSONS OR PROPERTY WITHOUT THE STATE—VOID JUDGMENT.—If a nonresident has no property within a state where judicial proceedings are instituted against him, and there has been no personal service on him within the state, or voluntary appearance by him, there is nothing upon which its tribunals can adjudicate, and any judgment rendered under such circumstances, whether affecting the person only, or the property also, is void for want of jurisdiction of the person and of the subject matter, for no state can exercise direct jurisdiction and authority over persons or property without its territory.

ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—LEGISLATION SUBJECTING IT TO GARNISHMENT—VALIDITY OF.—Any legislation by a state in which a debt due to a nonresident creditor is garnished, which attempts to acquire jurisdiction over the debt by declaring it to be property within its limits, subject to seizure by service of process on the garnishee, and service by publication on the nonresident defendant, is a mere nullity, and incapable of binding such persons or property in the tribunals of another state where the creditor has his domicile.

ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—DISCHARGE OF BY GARNISHMENT PROCEEDING.—As the situs of a debt for the purpose of garnishment is at the domicile of the creditor, and as a debt due to a nonresident is not property within the state, it cannot be discharged by a garnishment proceeding where there has been no personal service on the defendant within the state, or a voluntary appearance by him. Under such circumstances, any judgment rendered against the creditor, as well as any judgment, the effect of which is, on its face, to discharge the debt due to the nonresident by requiring the debtor, the garnishee, to pay it to the nonresident's creditor, is without due process of law and void.

ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—PAYMENT OF JUDGMENT, BY GARNISHEE, AS A DEFENSE.—If a railway company is garnished for a debt due from it to a nonresident creditor, payable in the state of his residence, but

there is no personal service within the state of suit on the creditor, and he does not voluntarily appear, the payment by the company of a judgment rendered against it, under such circumstances, as garnishee, does not constitute any defense to a subsequent suit, brought by the creditor in the state of his domicile, to recover the debt of the company.

JUDGMENT VOID FOR WANT OF JURISDICTION.—THE "FULL FAITH AND CREDIT" CLAUSE of the federal constitution applies only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and does not preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter. It does not apply to a judgment in proceedings to garnish a debt due to a nonresident creditor, which is void because there was no personal service on the defendant within the state, or a voluntary appearance by him.

Action to recover wages. There was a judgment for the plaintiff, and the defendant appealed.

Thomas G. Jones, for the appellant.

S. L. Weaver, for the appellee.

⁴⁸¹ **BRICKELL, C. J.** The appellee, a resident of this state, and an employé of appellant, brought this action against appellant, the Louisville & Nashville Railroad Company, a corporation organized under the laws of the state of Kentucky, and doing business in that state and also in Alabama and Tennessee, to recover the amount of wages earned and due him for work and labor done here for appellant. In defense of the action, appellant set up the payment by it, previously to the commencement of this suit, of a judgment rendered against it in a justice's court in the state of Tennessee in an attachment suit, founded on a debt due in Tennessee, wherein appellee was defendant, and appellant was summoned to answer as garnishee. Appellee was a resident of Alabama at the time of the commencement, and during the pendency, of said attachment suit, was not personally served with notice thereof, had no actual notice, and did not voluntarily appear, but service was had on him ⁴⁸² by publication in accordance with the laws of Tennessee. The questions presented by this appeal are, therefore: 1. Whether the courts of one state have or can acquire jurisdiction to attach and condemn a debt due to a nonresident and payable in the state of his residence, by service of process on his debtor as garnishee, in the absence of personal service within the state of suit on the creditor, or his voluntary appearance; and 2. Whether, if such courts are without jurisdiction for this purpose, the payment by the garnishee of a judgment rendered against him as garnishee under

such circumstances will constitute any defense to a subsequent suit by his creditor to recover the debt.

The case presented is ruled, with respect to both questions, by the cases of Louisville etc. R. R. Co. v. Dooley, 78 Ala. 524, and Alabama etc. R. R. Co. v. Chumley, 92 Ala. 317. In the former case, it was held that a debt due by a foreign corporation to an employé in the state of its creation, although it was doing business in this state also, could not be subjected by a creditor in this state by attachment against the nonresident creditor and garnishment against the corporation. In the latter, we decided that the payment by a railroad corporation created by the laws of this state, but doing business also in Tennessee, of a judgment rendered against it in Tennessee under a garnishment issued on a judgment recovered in that state against an employé resident in this state, was no defense to an action by the employé to recover the wages due him for work done in this state, in the absence of evidence showing that, by the statutes of Tennessee, the court had acquired jurisdiction of the debt sought to be reached and subjected. In both of the above cases it was expressly decided that the situs of a debt for the purpose of garnishment is at the domicile of the creditor, and not that of the debtor. And this fact is the true foundation of the proposition that a state has no jurisdiction over a debt due to a nonresident and payable without the state of suit, in the absence of personal service on the creditor within the state, or his voluntary appearance in a proceeding in which jurisdiction over it is sought to be exercised. If it be conceded that a debt due by a resident of, or a corporation doing business in, one state to a resident in another state is not ⁴⁸³ property within the state of the debtor's residence, no legislation by the latter state can give it a situs there for the purpose of enabling its citizens, or other persons resorting to its courts, to subject it to the payment of claims against the creditor by garnishing the person or corporation from whom it is due. If it has no situs within the debtor's state, in the absence of legislation, any legislation attempting to give it such situs, or to prescribe the manner of service on either the debtor or the nonresident creditor, by which jurisdiction over it may be acquired, unless by personal service on the creditor within the state, or his voluntary appearance, would be as nugatory and ineffectual to dispose of the creditor's property in the debt as would be legislation attempting to acquire jurisdiction over tangible property situated without the state. The subject matter of such legislation, namely, the property over which it is attempted to

acquire jurisdiction, is entirely beyond the power and control of the state. In the view we take of the question, the condemnation of a debt due to a nonresident, without personal service within the state of suit on the defendant, or owner of the debt, or his voluntary appearance, is without due process of law, and it seems manifest that a state cannot make that due process of law which is not such: *Martic v. Central Vermont Ry. Co.*, 50 Hun, 347, 3 N. Y. Supp. 82. It is immaterial also, under this concession, whether the corporation garnishee, if the garnishee be a corporation, is one created by the laws of the state where the debt is sought to be condemned, or is a foreign corporation doing business therein by permission of the state. The question is not one of jurisdiction over the garnishee, but one of jurisdiction over property situated without the state, and, through the seizure of such property, over the owner thereof.

The right of a state to inquire into the obligations of a nonresident, and its jurisdiction to attach his property to answer for such obligations, is founded solely on the fact that each state has exclusive control and jurisdiction over the property situated within its territorial limits, and the inquiry can be carried only to the extent necessary to control the disposition of such property. If there be no personal service on the defendant ⁴⁸⁴ or owner of the property, or appearance by him, the jurisdiction cannot extend beyond binding the property attached or effects garnished. Consequently, if the nonresident has no property within the state, and there has been no personal service on him within the state, or voluntary appearance by him, there is nothing upon which its tribunals can adjudicate; and any judgment rendered under such circumstances, whether affecting the person only, or the property also, would be void for want of jurisdiction of the person and of the subject matter: *Exchange Nat. Bank v. Clement*, 109 Ala. 280; *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350; *Freeman v. Alderson*, 119 U. S. 185. It was held in *Pennoyer v. Neff*, 95 U. S. 714, that in a suit on a money demand against a nonresident, substituted service of process by publication is effectual only where, in connection with process against the person for the commencement of the action, property within the state is brought under the control of the court, and subjected to its deposition by process adapted to that purpose, or where the judgment is sought as a means of reaching said property or affecting some interest therein, and that a judgment by default against a nonresident upon such service only, no property of the defendant within the state having been seized

prior to the rendition of the judgment, was without due process of law and void; and the title of defendant to property within the state sold under execution issued on such judgment was not divested by such sale, notwithstanding the statutes of the state of suit authorized service in this manner upon a nonresident, and attempted to protect the title of a purchaser in good faith of property sold under execution issued on such judgment. In the opinion by Mr. Justice Field it is said: "No state can exercise direct jurisdiction and authority over persons or property without its territory. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it has been laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons ⁴⁸⁵ or property to its decisions. 'And any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity and incapable of binding such persons or property in any other tribunals.'" This decision, involving as it did a construction of the fourteenth amendment of the federal constitution, and its effects on judgments rendered against nonresidents without personal service or voluntary appearance, and without a preliminary seizure of property of the defendant within the state of suit, is binding upon, and must be followed by, the courts of the several states. It necessarily results from the principles declared therein that if the situs of a debt for the purpose of garnishment be at the domicile of the creditor, and the debt be not property within the garnishee state, any judgment rendered against the creditor, as well as any judgment the effect of which is, on its face, to discharge the debt due to the nonresident by requiring the debtor, the garnishee, to pay it to the nonresident's creditor, is without due process of law and void, unless there was personal service on the defendants within the state, or a voluntary appearance by him. It necessarily follows, also, that the payment of such judgment by the garnishee is no protection to him in a subsequent suit by his creditor to recover the debt, and that any legislation by the garnishee state attempting to acquire jurisdiction over the debt, by declaring it to be property within its limits, subject to seizure by service of process on the garnishee and service by publication on the nonresident defendant, "is a mere nullity, and incapable of binding such persons or property in any other tribunals."

Any attempt to reconcile the conflicting authorities on the question of the situs of a debt for the purpose of garnishment would be vain, but analogy, as well as reason and justice to the creditor, would seem to fix it at the domicile of the creditor, and forbid its seizure, or any change in the ownership thereof, by the law or procedure of any other state. It is now well settled that a debt due by an insolvent to a nonresident is property within the creditor's state, and that no law or decree of the debtor's state discharging his debts can operate to discharge the debt due to the nonresident: *Brown v. Smart*, 145 U. S. 454; *Denny v. Bennett*, 128 U. S. 486 489; *Pattee v. Paige*, 163 Mass. 352, 47 Am. St. Rep. 459; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Wilson v. Matthews*, 32 Ala. 345. It is equally well settled that, for the purpose of taxation, a debt has its situs at the domicile of the creditor: *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Kirtland v. Hotchkiss*, 100 U. S. 491; *In re Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632; *State v. Ross*, 23 N. J. L. 517; *Boyd v. Selma*, 96 Ala. 150. In the opinion of the *State Tax* case, it was said: "But debts owing by a corporation, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in the debts of corporations belongs to the creditors to whom they are payable, and follows their domicile, whatever they may be. Their debts can have no locality separate from the parties to whom they are due." We are unable to perceive any sound reason for giving to a debt a different situs for the purpose of garnishment, and none satisfactory to us has been offered by those decisions which give it a different situs for this purpose only. If a debt due to a nonresident cannot be discharged by an insolvency law or decree of the debtor's state, because of a want of jurisdiction over the creditor and the debt, a like reason should forbid its discharge by garnishment proceedings. Those courts which adhere to the contrary view are not themselves in accord as to the theory upon which they can acquire jurisdiction over such debts. In some it is held that for the purpose of garnishment a state has the power to fix the situs of a debt at the domicile of the debtor, although the creditor be a nonresident: *Williams v. Ingersoll*, 89 N. Y. 508; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448; *Bragg v. Gaynor*, 85 Wis. 468. As we have seen above, the exercise of

such power would be a nullity in its effect upon the person of a nonresident or the debt due him. Others hold that the situs of a debt is wherever a suit may be maintained to recover it: *Harvey v. Great North. Ry. Co.*, 50 Minn. 406; *Wyeth Co. v. Lang*, 127 Mo. 242, 48 Am. St. Rep. 626. As a general proposition, this, as we have seen, is incorrect, and, as ⁴⁸⁷ limited and applied to garnishments only, it seems to us, merely an arbitrary distinction. Moreover, if its situs is in the state of the debtor only by reason of the fact that a suit to recover it may there be maintained, a debt due by a foreign corporation doing business in a state other than that of its creation to a nonresident of such state could not be reached by a garnishment sued out in the state, in the absence of a statute expressly authorizing it to be sued therein on a cause of action arising without the state; for it is well settled, as a general rule, that no action in personam can be maintained against a foreign corporation, unless the contract sued on was made or was to be performed, or the injury complained of was suffered, in the state in which the action is brought: *Central R. R. etc. Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339; *St. Clair v. Cox*, 106 U. S. 350. And it has been expressly held that a nonresident creditor of a corporation cannot have his property in a debt seized in a state to which the corporation may resort merely for the purpose of doing business through its agents, when the claim arose on a contract not to be performed with the state of suit: *Reimers v. Seatco Mfg. Co.*, 70 Fed. Rep. 573; *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 43 Am. St. Rep. 448. We prefer to adhere to the principle upon which our former cases were decided, that the situs of a debt is at the domicile of the creditor for the purpose of garnishment as well as for other purposes: *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Alabama etc. R. R. Co. v. Chumley*, 92 Ala. 317; *Reno on Non-residents*, sec. 138 et seq.; *Illinois Cent. Ry. Co. v. Smith*, 70 Miss. 344, 35 Am. St. Rep. 651, and notes; *Central Trust Co. v. Chattanooga etc. Co.*, 68 Fed. Rep. 685; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 19 Am. St. Rep. 143; *Renier v. Hurlbut*, 81 Wis. 24, 29 Am. St. Rep. 650. Adhering to this respect to the situs of the debt due from appellant to appellee, we are constrained by the decisions of the supreme court of the United States, cited above, to hold that the judgment of the Tennessee court, operating as it did, on its face, to condemn and divest appellee's property in the debt over which it had not acquired jurisdiction by personal service within the state on appellee, or by his voluntary appearance, was without due process of law and

absolutely void for want of jurisdiction of the res, the debt, or of the person of ⁴⁸⁸ its owner. To such judgments, the constitution of the United States does not require that any faith and credit be given; the constitutional provision that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, being now construed as applicable "only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter": *Pennoyer v. Neff*, 95 U. S. 714.

We find no error in the judgment of the city court, and it must be affirmed.

ATTACHMENT—NONRESIDENT.—THE SITUS OF A DEBT FOR THE PURPOSE OF GARNISHMENT is, according to some authorities, at the residence of the creditor, but by other authorities it is considered to be at the place where the debtor resides: *Balk v. Harris*, 124 N. C. 467, 70 Am. St. Rep. 606, and note; monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 117, 118, treating of the situs of debts for the purpose of garnishment; extended note to *Missouri Pac. Ry. Co. v. Sharitt*, 19 Am. St. Rep. 146, 147. By the great weight of authority, however, debts are considered as the property of the persons to whom they are due, and their situs, for the purpose of garnishment, is considered to be at the domicile of the creditor: *Note to National Bank v. Furtick*, 69 Am. St. Rep. 117. It follows that a garnishment in one state of a debt due and payable in another is void: *Morawetz v. Sun Ins. Co.*, 96 Wis. 175, 65 Am. St. Rep. 43, 47. A foreign corporation cannot be summoned as garnishee in one state, to reach a debt payable by it in another state: *National Bank v. Furtick*, 2 Marvel, 35, 69 Am. St. Rep. 99, and note at page 122. To subject property to garnishment it must be within the jurisdiction of the court: *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 40 Am. St. Rep. 522.

JURISDICTION—ATTACHMENT—SERVICE BY PUBLICATION.—In attachment proceedings the res must be within the jurisdiction of the court issuing the process in order to confer jurisdiction, and the law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, so as to bind another jurisdiction by the declaration: *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448. If property is attached and the defendant served by publication only, the court has jurisdiction to render a judgment personal in form, but affecting only the property attached: *Neufelder v. German American Ins. Co.*, 6 Wash. 336, 36 Am. St. Rep. 166. A personal judgment cannot be rendered against a nonresident who has not been served with process within the state: *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634, 54 Am. St. Rep. 573. A personal judgment rendered upon service of summons by publication, the record not disclosing that any property has been attached, is void: *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800.

JURISDICTION—NONRESIDENTS—JUDGMENT WITHOUT APPEARANCE, OR SERVICE, EXCEPT BY PUBLICATION—“FAITH AND CREDIT.”—A state court has no jurisdiction to render judgment against a person, when neither he nor any property of his has been found within the state: *Notes to Alley v. Caspari*, 6 Am. St. Rep. 179; *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 179. Jurisdiction of the person and subject matter is essential to the validity of a judgment: *Springer v. Shavender*, 118 N. C. 33, 54 Am. St. Rep. 708. The jurisdiction of a court of a sister state to render a judgment may be inquired into, and, if there was no jurisdiction, the judgment is a nullity: *Foshier v. Narver*, 24 Or. 441, 41 Am. St. Rep. 874. A judgment of a court of a sister state, without an appearance or service of process, is void in this state: *Notes to McCreery v. Davis*, 51 Am. St. Rep. 810; *White v. Johnson*, 50 Am. St. Rep. 739; *Foshier v. Narver*, 24 Or. 441, 41 Am. St. Rep. 874; note to *Wilson v. St. Louis etc. Ry. Co.*, 32 Am. St. Rep. 639. The courts of one state are not bound, under the federal constitution, to give such judgments of another state any more “faith and credit” than they would have in the state where they were rendered: *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, and note; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448.

GARNISHMENT—PAYMENT OF JUDGMENT—DEFENSE TO ANOTHER ACTION.—A judgment in a garnishment suit, valid and binding upon the parties thereto, is entitled to full “faith and credit” in another state, and cannot be collaterally attacked. Payment and satisfaction of such judgment by the garnishee is a complete defense to an action in another state to recover the same debt: *Chicago etc. R. R. Co. v. Moore*, 31 Neb. 629, 28 Am. St. Rep. 534. It has been held that, where a foreign insurance company is garnished in one state upon its indebtedness to a citizen of another state, such garnishment is a good defense to an action in the latter state against the company for the same debt: *Neufelder v. German American Ins. Co.*, 6 Wash. 336, 36 Am. St. Rep. 166.

HOENE v. POLLAK.

[118 ALABAMA, 617.]

ESTOPPEL IN PAIS—ACQUIRING EQUITABLE INTEREST IN LANDS BY.—Notwithstanding the requirements of the statute of frauds, declaring void certain contracts for the sale of land, unless evidenced by writing, subscribed by the party to be charged, an equitable interest may be acquired in lands, without any written transfer of title, by the conduct or declaration of the owner which would create an equitable estoppel in pais on his part; and this rule applies to corporations as well as to natural persons.

ESTOPPEL IN PAIS—ACQUIRING EQUITABLE INTEREST IN LANDS BY—CORPORATIONS.—Although an agent of a corporation, authorized to sell land, or any interest in land, can convey no legal title or freehold estate without he has authority in writing to sell, yet the directors or governing body of the corporation may so act as to estop themselves from denying the existence of such written authority, and thus create an equitable estoppel in pais.

ESTOPPEL IN PAIS—ACQUIRING EQUITABLE INTEREST IN CORPORATE PROPERTY BY—ILLUSTRATION.—If the directors of a corporation, who own all of its capital stock, prepare

a deed conveying its entire property, and send it for execution to one who has been acting as president of the company, all of such directors, after the deed has been so executed and returned to them, and possession of the property conveyed has been delivered to the grantee, are equitably estopped by their act and conduct from attacking the deed on the ground that it was executed without authority by one who had usurped the office of president of the company.

HUSBAND AND WIFE—SEPARATE PERSONAL PROPERTY OF WIFE—DISPOSAL OF—STATUTE—STOCK OF CORPORATION.—Under a statute which authorizes a husband and wife to dispose of the latter's personal property by parol, the husband, without authority in writing, may, with the assent of his wife, vote stock owned by her in a corporation at corporate meetings, and consent for her to a transfer of all of the corporate property to another corporation, to be paid for by capital stock of the latter company issued to the stockholders of the former, as the capital stock of a corporation is personal property.

HUSBAND AND WIFE—HUSBAND'S DISPOSAL OF WIFE'S SEPARATE PERSONAL PROPERTY—RATIFICATION—ILLUSTRATION.—If a wife is a majority stockholder in a corporation, and her husband, who is also a stockholder therein, votes her stock for her in favor of a transfer of all of the corporate property to another corporation, which transfer is made, and the property paid for by capital stock of the latter company issued to the stockholders of the former, and the wife, after thus acquiring stock of the purchasing corporation, knowingly disposes of a portion thereof, she thereby assents to what has been done, even if there was no prior authority given for the act of her husband.

HUSBAND AND WIFE—HUSBAND'S DISPOSAL OF WIFE'S SEPARATE PERSONAL PROPERTY—RATIFICATION—ILLITERACY.—In applying the principles of equitable estoppel to the acts of a married woman, which constitute a ratification of her husband's acts with respect to her separate personal property, it is immaterial that she could not read or write, and understood the English language only with difficulty, where no advantage is shown to have been taken of her ignorance.

Samuel Will John, Tompkins & Troy, and R. H. Fries, for the appellant.

Alex. T. London and John London, for the appellee.

621 **BRICKELL, C. J.** This appeal is taken from a final decree dismissing a bill filed by appellant, a married woman, and a majority shareholder in the Hoene, Warrior, and Jefferson Coal Company, to set aside a deed executed in the name of said company by "I. Pollak, president," by which all the property and assets of said corporation were conveyed to the Hoene Consolidated Coal and Iron Company in consideration of two hundred and fifty thousand dollars of its capital stock to be issued to the shareholders of the former corporation in proportion to their respective holdings of stock therein. •

It is alleged in the bill that said Pollak was not the president of said Hoene, Warrior, and Jefferson Coal Company, and was

without any authority to execute said deed. It is further alleged that said deed was made without the knowledge or consent of appellant, and she disclaims all right to any of the stock in said Hoene Consolidated Company. She denies that she ever subscribed for any of said stock or authorized anyone to do so for her, and she avers that she did not receive any of the certificates for the same, and had never had possession or control thereof. The evidence shows that there was no formal subscription to the capital stock of the said Hoene Consolidated Coal and Iron Company; the stock was merely issued to those entitled thereto in consequence of said conveyance, including seven hundred and two shares to appellant, and ten shares to her husband, B. H. Frank Hoene. Appellant and ⁶²²her husband were both elected directors. The husband testified that he received the certificate for said seven hundred and two shares for his wife and kept it with her other papers. He represented her in all the meetings of said Hoene Consolidated Company, and her said stock was voted affirmatively by him for her at the meeting called to authorize the issue of the bonds of said company, and the execution of the deed of trust upon its property, under which appellee claims. Appellant testified that her husband attended to all of her business, and we are satisfied from the evidence that he represented her in the matters of said two corporations with her full consent and authority. No formal authority is shown to have been conferred upon appellee to execute the deed from the Hoene, Warrior, and Jefferson Company to the Hoene Consolidated Company, and there is conflict in the testimony as to whether he was then the president or even a shareholder in said former corporation. The evidence shows, however, that he had acted as president of said company, and that the deed was sent him by the husband of appellant and the general manager of said Hoene, Warrior, and Jefferson Coal Company for execution, and that possession of the property conveyed was delivered by said company to said Hoene Consolidated Company under said deed.

No body corporate can appoint an agent to convey lands except by a vote of its directors or other managing board in whom the power to sell may be reposed by charter or generally by law: *Standifer v. Swann*, 78 Ala. 88; this by reason of the statute of frauds. Notwithstanding the requirements of the statute of frauds, declaring void certain contracts for the sale of land, unless evidenced by writing subscribed by the party to be charged, an equitable interest may be acquired in lands without any written transfer of title by conduct or declaration of the owner

which would create an estoppel in pais on his part. This rule applies as well to corporations as to natural persons. The fact that they must necessarily act through the instrumentality of agents, either immediate or intermediate, and can act in no other way, does not change the principle. And although an agent of a railroad or other corporation authorized to sell land or any interest in land can convey no legal title or freehold estate unless his authority to ⁶²³ sell be in writing, this being a question of actual authority, yet the directors or governing body may so act as to estop themselves from denying the existence of such written authority and thus create an equitable estoppel in pais: Alabama etc. R. R. Co. v. South & North Ala. R. R. Co., 84 Ala. 578, 5 Am. St. Rep. 401; South & North Ala. R. R. Co. v. Alabama etc. Railroad Co., 102 Ala. 238. We are of opinion the facts established such equitable estoppel in this case. The directors of the Hoene, Warrior, and Jefferson Coal Company were, according to appellant's testimony, the appellant, her husband, and M. A. Hoene, her son—owning all the capital stock. In sending the deed to Pollak for execution for said company as its president, they affirmed his authority for that purpose. After the execution of the deed by Pollak, it was returned to the husband, recorded, and possession of the property conveyed was surrendered by the directors to the Hoene Consolidated Coal and Iron Company, thus ratifying the execution of the deed. The Hoene Consolidated Coal and Iron Company remained in possession of and operated the said property until the 20th of January, 1892, at the time of the filing of the bill for the foreclosure of the deed of trust executed by that company upon said property, when the want of formal authority for the execution of the deed by Pollak was discovered, and the property was surrendered by B. H. Frank Hoene and M. A. Hoene to M. A. Hoene as president of said Hoene, Warrior, and Jefferson Coal Company, upon the demand of said B. H. Frank Hoene for its said directors. While in possession of the property, the Hoene Consolidated Company issued its bonds for the payment of its indebtedness, consisting in part of an indebtedness to the said Hoene, Warrior, and Jefferson Company for part of the land conveyed, and secured the payment of said bonds by a deed of trust upon its property. The issue of these bonds and the execution of said deed of trust by said company was authorized by a meeting of the shareholders of said company regularly called and held on the twentieth day of June, 1889, at which meeting the said M. A. Hoene and B. H. Frank Hoene were present, the

latter also representing the appellant, his wife, and voting her stock in favor of the proposition. There is evidence that appellant was at one time present at said meeting, and upon ⁶²⁴its adjournment heard its object discussed. We are satisfied that she knew of its purpose.

There is nothing in the fact that appellant was a married woman at the time of the matters complained of which required that her husband should be authorized in writing to consent for her to the conveyance of the property of the said Hoene, Warrior, and Jefferson Coal Company, to the Hoene Consolidated Coal and Iron Company, for its capital stock to be issued to the shareholders of the former corporation, nor to receive said stock for her, nor to vote it for her at the meetings of said company. Her interest in the Hoene, Warrior, and Jefferson Coal Company, represented by her stock therein, was personal, not real, property, as was also the stock in the Hoene Consolidated Company, which she received in consideration of the conveyance. Her capacity to deal in reference to it, or to dispose of it, was governed by section 2348 of the code of 1886, which declares that "the personal property of the wife, or any part thereof, may be sold, exchanged, or otherwise conveyed or disposed of by the husband and wife, by parol or otherwise." As was said in the case of *Pioneer Sav. etc. Co. v. Thompson*, 115 Ala. 552: "Manifestly, all that is required by this statute is the assent of both the husband and wife to the sale or exchange, and it is not essential that such assent be manifested by any writing or other particular mode. A fair construction of the statute does not require that both shall be actually present and express their assent at the time and place the sale or exchange is made. If one authorizes the other to make the contract, and it is done in pursuance of that authority, there is the necessary assent of both." Apart from the existence of prior authority from appellant to her husband, the evidence shows that she knowingly disposed of a portion of the stock in the Hoene Consolidated Coal and Iron Company which her husband received for her under and by reason of said conveyance which she now seeks to set aside. We are satisfied from the evidence that she could not have been ignorant as to how her stock was acquired. She therefore assented to what had been done. This was sufficient although there had been no prior authority: *Pioneer Sav. etc. Co. v. Thompson*, 115 Ala. 552; *Steiner v. Trantum*, 98 Ala. 315; *Mary Lee* ⁶²⁵*Coal etc. Co. v. Winn*, 97 Ala. 495. The appellant cannot, in a court of equity, be now permitted to assert any right

or title in opposition to the conveyance from the Hoene, Warrior, and Jefferson Coal Company to the Hoene Consolidated Coal and Iron Company.

It can make no difference in the application of the above principles that appellant could not read or write, and understood the English language only with difficulty. No advantage is shown to have been taken of her ignorance.

The decree of the chancellor is affirmed.

EQUITABLE ESTOPPEL DEPENDS upon the facts and circumstances of each particular case. Respecting the title to land, it is such conduct as prevents a party from setting up his legal title, because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience: *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 84. One who knowingly causes another to believe in the existence or nonexistence of a certain fact, believing which, the latter alters his previous condition, the former is estopped to deny the existence or nonexistence of such fact: *Note to Marines v. Goblet*, 17 Am. St. Rep. 24; *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538.

AGENCY—CONTRACT AS TO LANDS—AGENT MUST HAVE WRITTEN AUTHORITY TO PASS TITLE.—Under the Alabama statute of frauds, no legal title to lands will pass by or under a contract made with an agent, unless the agent has a written authority: *Alabama etc. R. R. Co. v. South etc. Alabama R. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401.

ESTOPPEL IN PAIS—ACQUIRING AN EQUITABLE INTEREST IN LANDS BY—CORPORATIONS.—Notwithstanding the requirements of the statute of frauds, declaring void certain contracts for the sale of land unless evidenced by writing and subscribed by the party to be charged, yet an equitable interest may be acquired in lands, without any written transfer of title, by conduct or declarations of the owner which would create an estoppel in pais on his part; and this rule applies to corporations as well as to natural persons: *Alabama etc. R. R. Co. v. South etc. Alabama R. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401. But, under the statute of frauds, it is not permissible that an estoppel in pais should work a transfer of the legal title to land: *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533.

ESTOPPEL IN PAIS—TITLE TO LAND—ACQUIESCENCE OF CORPORATION IN ACT OF ITS AGENT.—Although the agent of a corporation can convey no legal title to land unless his authority is in writing, yet the directors or governing body may so act as to estop themselves from denying the existence of such written authority, and thus create an equitable estoppel in pais; as, where the agent acted openly and notoriously, and the corporation, for a long time, acquiesced in his acts: *Alabama etc. R. R. Co. v. South etc. Alabama R. R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401.

RATIFICATION BY CORPORATIONS. AND ITS EFFECT.—The assent of a corporation to acts done on its account may be inferred in the same manner that the assent of a natural person may be: *Bank of Alabama v. Comegys*, 12 Ala. 772, 46 Am. Dec. 278. A corporation may approve the unauthorized acts of its agents and make them its own, which approval may be manifested either by express acknowledgment or act, or be inferred from circumstances: *Leggett v. New Jersey etc. Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

The approval by a corporation of the acts of one acting as its agent makes those acts as valid as though authorized in the first instance: *Everett v. United States*, 6 Port. 166, 30 Am. Dec. 584. Though the power to make contracts is vested in the board of directors, a contract entered into by the president is binding, if the evidence sufficiently establishes a ratification by the directors of the president's act: *Pixley v. Western etc. R. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; but the ratification by a corporation of a contract made by its president, without authority, must be made with full knowledge of the terms of the contract: *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602, 81 Am. Dec. 132.

ESTOPPEL IN PAIS.—**IGNORANCE** of the party against whom an estoppel is urged will not excuse him where he was in such a position that he could have ascertained the truth, or ought to have known it: *Note to Weinstein v. National Bank*, 5 Am. St. Rep. 28; but see *note to Guffey v. O'Relley*, 57 Am. Rep. 433.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MAYER v. BRENSINGER.

[180 ILLINOIS, 110.]

BAILMENTS — SAFETY DEPOSIT COMPANIES — CARE REQUIRED OF.—A safety deposit company, without any special contract to that effect, is a bailee or depositary for hire, and as such is bound to exercise ordinary care and diligence in the preservation of property intrusted to it. Ordinary care and diligence in such case is such as every prudent man takes of his own goods.

BAILMENTS — SAFETY DEPOSIT COMPANIES — CARE REQUIRED OF—QUESTION FOR JURY.—The question whether a safety deposit company used proper care in keeping property intrusted to it is for the jury, when it is shown that the company's clerk, knowing that a depositor affected with brain trouble was then in a hospital, permitted strangers to have access to his deposit box without identification or authority, except that they had a key to such box, and power of attorney from the depositor, which was not retained by such clerk.

TRIAL—DISMISSAL AS TO ONE DEFENDANT—APPELLATE PRACTICE.—If an action is dismissed as to one joint defendant, and judgment is rendered against the other without amendment of the complaint, there is a variance, to take advantage of which on appeal the defendant must specifically point out the objection in the trial court, and give the plaintiff an opportunity to amend.

TRIAL—DISMISSAL AS TO ONE JOINT DEFENDANT. The rule that in a joint action *ex contractu* a dismissal as to one joint defendant effects a discontinuance of the entire action so as to render a judgment against the remaining defendant or defendants erroneous is subject to the exception that it does not apply when the defendant against whom the dismissal was had was not a necessary or proper party.

TRIAL—ORDER OF ADMISSION OF EVIDENCE.—The order in which evidence shall be heard and the right of plaintiff to proceed in the first instance with evidence to anticipate the defense are matters of discretion resting solely with the trial court, and are not subject to revision or exception.

EVIDENCE—ADMISSIBILITY OF RECORD TO PROVE COLLATERAL MATTER.—In an action to recover money lost while in the custody of a safe deposit company, a foreign decree of distribution in favor of the depositor is admissible in evidence to show that he had the amount of money he claims to have lost.

Felsenthal & D'Ancona and H. Roth, for the appellant.

F. L. Rumble, E. Madden, and C. F. Gooding, for the appellee.

112 **MAGRUDER, J.** The appellee, Brensinger, came to Chicago from Philadelphia with four thousand eight hundred and forty-three dollars in August, 1895. On October 1, 1895, he rented a box, known as box No. 578, from the appellant, ¹¹³ who kept for rent boxes in certain deposit vaults, owned by him in the city of Chicago, and called by him "The German-American Safety Deposit Vaults"; and, upon the date last named, the appellee deposited therein four thousand seven hundred dollars. Appellee, in April, 1896, put into the box three hundred and eighty-four dollars more. He took out small sums of money from time to time to enable him to live. He was an unmarried man, economical in his habits, and his dress and general appearance were those of a man who was poor and without means. According to his statement, he last counted the money in his box on September 25, 1896, and says that there was, at that time, four thousand six hundred dollars in gold and large bills in the box. Subsequently, appellee became afflicted with brain fever, or some trouble which affected his mind, and on October 7, 1896, was taken to a detention hospital, from which he was discharged on October 22, 1896. While he was in the hospital, the money in his box was abstracted therefrom, and the discovery of its loss was not made by him until about October 26, 1896.

The facts of the case are all settled by the judgment and verdict in the circuit court and the judgment of the appellate court, affirming the judgment of the circuit court. The relation which appellant bore to the appellee was that of a bailee or depository for hire. As such bailee or depository for hire, appellant was bound to exercise ordinary care and diligence in the preservation of the property intrusted to him by the appellee. Ordinary care in such cases is such care as every prudent man takes of his own goods; and ordinary diligence in the preservation of such goods is such diligence as men of common prudence usually exercise about their own affairs: Chicago etc. *R. R. Co. v. Scott*, 42 Ill. 132. Although one who hires a box

in the vaults of a safety deposit company may keep the key himself, yet the company, without any special contract to that effect, will be held to at least ordinary care in keeping the deposit. The duty of exercising such care arises from the nature ¹¹⁴ of the business which the safety deposit company carries on. The obligation to discharge such duty is implied from the relation between the parties. Here, it clearly appears that the appellee paid rent for the box in which he deposited his money: *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Roberts v. Stuyvesant Safety Deposit Co.*, 123 N. Y. 57, 20 Am. St. Rep. 718; 2 *Wait's Actions and Defenses*, 519; *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660. In the case at bar, the instructions given to the jury told them that the defendant below was not an insurer of the money or goods which appellee had deposited in his custody, but that the appellant owed to the appellee the duty of using reasonable and ordinary care in the protection of the money deposited with him. The jury and the courts below have found that the appellant did not exercise such ordinary and reasonable care. Appellant moved to take the case from the jury, and that they be directed to find the issues for the defendant upon the ground that the evidence did not tend to show negligence on the part of the appellant. We think, however, that the proof was sufficient to submit to the jury the question whether or not the appellant was guilty of negligence in the premises.

Simon Mayer, the son of the appellant, was a clerk in his employ, and seems to have had charge of the vaults, and was in fact the manager of the same. Simon Mayer says that, on October 17, 1896, two men came into the office, where the vaults are located, and where he and a clerk, named Martin Blondein, were present. He says that one of these men stated his name to be L. J. Rowe, but he does not recollect the name of the other man. He further testifies that these two men showed him a power of attorney alleged to be signed by appellee, and that they had a key to appellee's box numbered 578. He describes the two men as follows: "The two gentlemen were about the same height; one had a black mustache, thin features, wore a fedora hat, dark hair, black cut-away coat, and striped trousers; the other party with ¹¹⁵ him had on a brown overcoat, stiff hat, heavier mustache than the one who presented the power of attorney, and was a heavier set person; I should judge this man to be about five feet four or five inches in height; I sized them up." He says that the power of attorney purported

to be signed by Brensinger, and was dated October 17, 1896, and appeared to be acknowledged before a notary public, who signed and sealed his certificate thereto. Simon Mayer failed to require the man stating his name to be Rowe to leave the power of attorney with him. Nor is he able to state the name of the notary before whom it purported to be acknowledged. He required no identification of Rowe. The latter stated that he lived on the west side, but that he could not be identified in the neighborhood where he lived, because he was not acquainted there. Simon Mayer did not ascertain the precise residence nor business of the men who thus came to him. He says they told him that Brensinger was very sick, and not expected to live through the day. The evidence shows that Simon Mayer had been informed before October 17, 1896, that appellee was in the detention hospital on account of illness. He says that a gentleman came in some time in October, and told him that appellee was in the detention hospital and that appellee claimed to have a box in the vault in question with four thousand dollars in it. It also appears from the evidence that on October 16, 1896, the day before the men appeared at the vault, Solomon Mayer, the appellant, went to the detention hospital, and there had a conversation with Brensinger. Simon Mayer permitted these two men, according to his own testimony, to open the vault, and take out the box which had been rented by the appellee. He says that he was so situated with reference to the box that he saw them when they opened it, and saw that they took nothing out of it; and yet, in another part of his testimony, he says that Rowe's back was turned toward him when he opened the box. Although he did not retain the power ¹¹⁰ of attorney, he undertakes to give its contents verbatim. Simon Mayer also states that, on October 26th or thereabouts, appellee, after his discharge from the hospital, came and examined his box, and appeared disturbed after the examination. He asked him: "What is the matter? Is there anything wrong?" and appellee said, "My money is gone." Simon Mayer then proceeds in his evidence as follows: "I said, 'What money?' He said: 'I had some money in here—five hundred dollar bills and a new envelope, and they are gone.' I said, 'Where did you have them?' He said: 'Right on top there.' Then I said to him, 'It is impossible; nobody could possibly get into this place except you, and you have got the key.'" It is somewhat singular that Simon Mayer should state to the appellee that it was impossible for him to have lost his money, and that nobody could get into

the vault except appellee, because appellee had the key, when, according to his own statement, two men had, about ten days before that time, come into the office with the key and with an alleged power of attorney, and were permitted by him to open the box and examine its contents. A rule of the office required the entrance ticket to be signed by the renter of a box before the latter was permitted to enter the vault. Simon Mayer says that upon October 17, 1896, Rowe was required to sign an entrance ticket, and he did so in the following way: "Allert Bronsinger, by L. J. Rowe." This peculiar and illiterate mode of spelling appellee's name did not seem to attract the attention of Simon Mayer. If the testimony of Simon Mayer as to what occurred upon October 17, 1896, while the appellee was in the detention hospital, is true, then we cannot say that the jury were not justified in finding that he had not exercised such ordinary care and caution as the law required of him. On the contrary, his neglect to require Rowe to identify himself, his neglect to retain the power of attorney presented, his neglect to retain the name of the notary public, and his knowledge that at that time ¹¹⁷ Brensinger was detained in a hospital on account of a serious illness, tend to show, not only want of ordinary care, but actual negligence in the protection of the property intrusted to him.

— Several errors are assigned in regard to the action of the court below in the conduct of the cause at the hearing.

1. It appeared from the evidence both of Solomon and Simon Mayer that the latter was merely a clerk of his father, and had no interest in the business, but that the safety vaults belonged exclusively to the appellant. Therefore, whatever liability existed was the liability of the appellant alone, and not of the appellant and Simon Mayer jointly. At the close of the evidence, appellee's counsel asked leave to amend the declaration by changing the form of action from *assumpsit* to *case*; and, upon leave being given to do so, exception was taken by the defendants. Thereupon, the defendants themselves moved to dismiss the case as to Simon Mayer. Counsel for appellee announced that they made no opposition to this motion, and thereupon the suit was dismissed as to Simon Mayer. Counsel for appellee then withdrew their motion for leave to amend the declaration, and the action stood as an action in *assumpsit*. It is claimed on the part of the appellant that the suit should have been dismissed as to the appellant when the order of dismissal was entered as to his codefendant Simon Mayer. It is too late

for the appellant to make that objection at this stage of the proceedings.

The general rule at common law is, that, under a declaration against two and a joint plea, the plaintiff cannot recover without establishing the joint liability. Here, however, the suit was actually dismissed as to the defendant Simon Mayer; and the judgment finally rendered was against the appellant alone, and not against the appellant and Simon Mayer. Although the declaration remained as a declaration charging a joint liability against the two defendants, yet this was a matter of variance ¹¹⁸ merely. The proof showed that only one defendant was liable. The declaration averred that both were liable. Appellant should, therefore, have moved to exclude the evidence on the ground of a variance; but he did not do so. If the objecting party desires to raise the question of variance, he must indicate it specifically in his objection, and point out in what it consists, so as to enable the court to pass upon the question intelligently, and also so as to enable the plaintiff to amend his pleadings to make them conform to the evidence. If the objection had thus been pointed out, the appellee may have amended his declaration immediately, subject to such terms as the court may have seen fit to impose: *Lake Shore etc. Ry. Co. v. Ward*, 135 Ill. 511; *Probst Construction Co. v. Foley*, 166 Ill. 31.

It is also to be observed that the dismissal of the suit as to Simon Mayer was upon the motion of the defendants, and not upon the motion of the appellee. Where an attorney for joint defendants stipulates for a discontinuance as to one of them, the others, having practically acquiesced, cannot urge the nonjoinder in bar of further proceedings: *Callam v. Barnes*, 44 Mich. 593. So, here, the appellant cannot rely on a nonjoinder, when he not only consented to it, but procured it by his own motion. The rule that, in order to recover in an action *ex contractu*, a cause of action must be established against all of the defendants, and that a dismissal or discontinuance as to one codefendant effects a discontinuance as to the entire action, so as to make a judgment against the remaining defendant or defendants erroneous, is subject to certain exceptions. One of these exceptions is, that whenever a defendant gives in evidence matter which is in bar to the action against himself only, and of which the other defendant cannot take advantage, judgment may be for such defendant and against the other. The most common illustration of this exception is, where a defense is interposed which is personal to the defendant who makes it,

¹¹⁰ such as infancy, coverture, lunacy, bankruptcy, and the like. Another exception is, where one is joined as a defendant in the action, who is an unnecessary or improper party: 6 Ency. of Pl. & Pr., 857-859; *Aten v. Brown*, 14 Ill. App. 451; *Morrow v. People*, 25 Ill. 330; *Frink v. Jones*, 4 Scam. 170; *Wight v. Meredith*, 4 Scam. 360; *State v. Williams*, 17 Ark. 371. In the case at bar, as Simon Mayer was merely a clerk of the appellant and without interest in the business carried on by the appellant, he was an unnecessary and improper party; and, therefore, the present case clearly falls within the exception to the rule.

In addition to what has been said on this point, section 6 of chapter 7 of the Revised Statutes in regard to amendments provides that "judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict . . . be reversed . . . by reason of any of the following imperfections, omissions, defects, matters, or things in the process, pleadings, proceedings, or records, namely: . . . 5. For any misleading, insufficient pleading, lack of color, miscontinuance, discontinuance, or misjoining of the issue, or want of a joinder of the issue. . . . 14. For any other default or negligence of any . . . of the parties or their counselors or attorneys, by which neither party shall have been prejudiced." In view of the broad terms of this statute in regard to amendments, it cannot be said that the court below committed error in overruling the motion in arrest of judgment.

2. Upon the trial below, the appellee introduced in evidence a properly certified copy of the will of appellee's mother, Charlotte Schmidt, as recorded in the district court of Lewis and Clarke county in the state of Montana in the matter of the estate of Charlotte Schmidt, deceased, and of the decree of settlement of account and final distribution, entered by said court in the matter of said estate. Appellee testified that his father had died, and that his mother married a second husband by the name ¹²⁰ of Schmidt. The will introduced in evidence showed that Mrs. Schmidt, after making certain legacies, devised and bequeathed all her estate to her son, Albert Brensinger, the appellee. The decree of settlement of account and final distribution, after directing certain payments to be made to certain legatees, ordered that the residue of the estate be distributed to the said devisee, Albert Brensinger. The decree describes the residue of the estate, so distributed to appellee, as being four thousand eight hundred and forty-five dollars and

sixty-eight cents in lawful money of the United States, cash in the hands of the executors, also a note for two thousand dollars, also certain real estate.

Two objections were made to the introduction of this record. The first objection is, that the record was introduced in evidence as a part of the original case of the plaintiff below, instead of being introduced as rebutting testimony. It was material for the plaintiff to show that he deposited in his box in the defendant's safety deposit vaults money equal to what he claimed to have lost. If there had been no other evidence of the placing of the money in the box than his own testimony, it may have been argued to the jury that his story was an improbable one. The will and decree introduced in evidence showed that he had, within a short time before he made the deposit in question, received from his mother's estate a larger amount of money than that actually deposited. It was apparent that the appellant intended to claim, as matter of defense, that the appellee had no such money as was alleged to have been deposited in the box in question. The appellee had a right to anticipate this defense, and show affirmatively, not only that he placed the money in the box, but that he actually had the money to place therein, and from what source it came to him. The order in which evidence should be heard, and the right of the plaintiff to proceed in the first instance with proof to anticipate the defense, are matters of discretion, resting solely with the judge before whom the trial is had, and are not subject to revision or exception. ¹²¹ In *Dimick v. Downs*, 82 Ill. 570, we said: "Although this, strictly, should have been rebutting, yet, when its materiality was foreshadowed by the line of the defense, it was within the discretion of the court to admit it in advance of the evidence which it was to rebut." How far the plaintiff should proceed in his proof in anticipation of the defense is regulated by the discretion of the judge, according to the circumstances of the case: 1 *Greenleaf on Evidence*, sec. 74; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *York v. Pease*, 2 *Gray*, 282; 1 *Thompson on Trials*, sec. 345.

The second objection made to the introduction of the record in evidence is, that it was not a full and complete record of all the proceedings in the matter of the estate of Charlotte Schmidt. The objection thus made is not tenable, for the reason that the record was not introduced in a proceeding to enforce the decree of distribution, but merely to establish a collateral fact. The requirement that the whole record must

be introduced is enforced in cases where a party intends to avail himself of a judgment or decree as an adjudication upon the subject matter, and where it is material for the record to show the jurisdiction of the court rendering the decree. Here, the suit is not upon the record introduced, but the record is introduced for the purpose merely of confirming the testimony of the appellant that he had the money which he claimed to have lost. A part of a record may be introduced to prove collaterally that a decree or judgment was made. Here, the decree of settlement and distribution was introduced merely for the purpose of showing the existence of such a decree, containing an order distributing the money to appellee. The other proceedings in the matter of the estate were immaterial, and could not have thrown any further light upon the subject. Where the rights under the decree are in dispute, in such cases the whole of the proceedings are material. But in the present case it is immaterial whether or not the order or decree of distribution was valid. It is sufficient ¹²² that, under it, the appellee obtained the money in question. The proceeding was a probate proceeding, which, in its nature, is *ex parte*. No good purpose could have been served by putting in the record any other facts than those which were shown: 1 *Greenleaf on Evidence*, sec. 511; 2 *Jones on Evidence*, secs. 607, 635; *Primm v. Haren*, 27 Mo. 205; *Reynolds v. Richards*, 14 Pa. St. 205; *Gilmore v. Taylor*, 5 Or. 89; *Locke v. Winston*, 10 Ala. 849; *Adams v. Olive*, 62 Ala. 418; *Crone v. Dawson*, 19 Mo. App. 214; *Harper v. Rowe*, 53 Cal. 233. Inasmuch as the question was not on the interpretation of the record introduced, but on its effect as evidence of a collateral fact, it was proper to submit it to the jury: *Reynolds v. Richards*, 14 Pa. St. 205. Moreover, the decree of settlement and final distribution contains recitals upon its face of notice, and other facts necessary to show the jurisdiction of the court; and such recitals were *prima facie* evidence of their contents. If it had been material to introduce other portions of the record to show thereby that the recitals in the decree were untrue, and that the court had no jurisdiction to render the decree, then it was the privilege of the appellant to introduce such other portions of the record upon the defense. The appellant, however, did not see fit to do so: *Gilmore v. Taylor*, 5 Or. 89.

3. The appellant makes a number of objections to the action of the court in admitting evidence in behalf of the appellee upon the trial below, and in refusing certain instructions asked by the appellant upon the trial. It is impossible for us to exam-

ine and comment upon all these objections. We will allude to only one or two of them. Upon the redirect examination of appellee, counsel for appellee asked this question: "When did you tell Dr. Stewart of the loss of your money?" This question was objected to, and the objection overruled. Of course, it would have been improper to ask the appellee what he said to some third person, not in the presence of the appellant, if such testimony had been introduced as a part ¹²³ of appellee's original case. But the question here was asked upon the redirect examination, and after the appellant, upon the cross-examination of the witness, had himself made the objectionable inquiry. Upon the cross-examination appellant's counsel asked the appellee this question: "Did you ever tell a living soul how much money you had in that box? A. I told Dr. Stewart. Q. How did you come to tell him?" et cetera. After appellant's counsel had thus questioned the witness upon the cross-examination, we see no error in permitting the question to be asked, which was asked upon the redirect examination.

Appellant also objects that the court refused the second and third instructions asked by the appellant. There was some testimony going to show that the appellee had been a miner in the far west and was an eccentric character, and exhibited peculiarities which might lead to the conclusion that he was not altogether of a perfectly sound mind. The second and third instructions required the jury to find that, if they believed that the appellee was of weak or unsound mind, or of deficient understanding, or was a short time prior to the trial of weak or unsound mind or of deficient understanding, they were at liberty to reject his testimony; and that, if they believed that he was laboring under a delusion that the money was deposited by him in the box in defendant's vaults, then their verdict should be for defendant. There was no error in refusing these instructions in view of the fact that, at the request of the appellant, the court gave an instruction to the jury, requiring them to take into consideration the mental capacity of the witness, and requiring them, if they should find the witness to be of weak or unsound mind, or of weak and unsound mind a short time prior to his testifying, they were at liberty to consider this fact, together with all the facts and circumstances in the case.

The judgment of the appellate court is affirmed.

TRIAL—DISMISSAL AS TO ONE JOINT DEFENDANT.—Where a plaintiff sues both a railway company and the conductor of one of its trains, he may dismiss as to the conductor at any time before

the jury retires, where the facts do not show that he was made a party for the purpose of weakening the effect of his evidence if offered as a witness for the defendant: *Texas etc. Ry. Co. v. Miller*, 79 Tex. 78, 23 Am. St. Rep. 308.

TRIAL.—THE ORDER OF INTRODUCING EVIDENCE is within the discretion of the trial court: *Note to Stephens v. Union Assur. Soc.*, 67 Am. St. Rep. 599.

Safety Deposit Companies—Liability of.

The relation which exists between a safety deposit company and its depositor, in the absence of any contract to that effect, is that of a bailee or depositary for hire, and as such bailee the depositary is bound to exercise ordinary care and diligence in the preservation of property deposited with him by his customer. Ordinary care, in such case, is such care as a prudent man takes of his own goods: *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660; *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263.

In *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131, it appeared that goods were stored in a warehouse in a separate space, with a lock securing it, under the control of the bailor, but with a promise on the part of the bailee that the goods would be safely kept and guarded, and it was held that the contract was one of bailment, casting upon the bailee the obligation of ordinary care and prudence. Again in *Lockwood v. Manhattan Storage etc. Co.*, decided by the appellate division of the supreme court of New York, April 7, 1898, and reported in 28 N. Y. App. 68, 50 N. Y. Supp. 974, it appeared that a storage company maintained in its warehouse a place set apart for safe deposit vaults, containing separate safe deposit boxes or safes, which were rented to customers. Access to the boxes could only be had by the use of two keys, one of which was held by the company and the other by the person renting the box. In an action against the company, plaintiff alleged and proved that she rented a box and placed four thousand dollars in bills therein, and that subsequently, when she opened the box, half of the money had been taken therefrom by another than herself, and the court held that the relation of the company to such depositor was that of a bailee for hire, and imposed upon it the burden of explaining and excusing the non-production of articles intrusted to it: *Lockwood v. Manhattan Storage etc. Co.*, 28 N. Y. App. 68, 50 N. Y. Supp. 974. To the same effect, *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660.

In *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 20 Am. St. Rep. 718, it was held that when property in the custody of a safe deposit company as a bailee for hire is demanded by third persons under an order or color of process. It becomes the duty of the depositary to ascertain whether the order is such as requires him to surrender the property, and, if not, it is his right and duty to refuse, and to offer such resistance, and to adopt such measures to reclaim it, if taken, as a prudent and intelligent man would if it had been demanded under a claim of right.

While in such case the bailee may excuse himself for permitting the property to be taken by a stranger by showing that he yielded to

legal process, a seizure under such process, after the bailee has negligently allowed the property to pass into the hands of a trespasser, is not a protection to him in an action by the owner. In this case of *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 20 Am. St. Rep. 718, it appeared that the defendant, a safe deposit company, received property on deposit as a bailee for hire, and rented one of its safes to the plaintiff. By its rules, printed on the back of a receipt given to the latter, its liability was limited to the diligent and faithful performance of their duties by its officers and employes, and it was provided that no one would be allowed inside the vaults for the purpose of opening any safe therein, except the lessee or his substitute, and that two persons would not be allowed to enter the vault at the same time unless personally known to the defendant company. Plaintiff placed in her vault or safe a certain sum of money, certain United States bonds, and other securities. A police officer, with a search warrant for certain United States bonds, alleged to have been stolen, accompanied by other persons prepared to break into the vault, appeared before the defendant and demanded access to plaintiff's safe, which was refused. The defendant company did not demand to see the search warrant or attempt to ascertain what portion of the contents of the safe it called for. They made no other resistance, but pointed out the safe. The officer broke it open and removed the contents. There was nothing in the safe corresponding with the property described in the search warrant, except the United States bonds, and the warrant contained nothing that would identify them by number, date of issue, or otherwise, as the stolen property. The officer took all of the property away with him, and no investigation was made to ascertain if any part of such property had been stolen. The defendant company did not attempt to notify the plaintiff, nor to procure a return of her property, and, in an action to recover the value thereof, it was held that the defendant company had failed to exercise the degree of care required of it as a bailee for hire, that being the relation it had assumed toward the plaintiff, and that it was liable for the value of the goods and property taken by the officer: *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 20 Am. St. Rep. 718.

FRIEDLANDER v. FENTON.

[120 ILLINOIS, 312.]

DEBTOR AND CREDITOR—MARSHALING ASSETS.—Although a person has a lien or interest in two funds and another has a lien on only one of such funds, the former cannot be compelled to first resort to the fund in which he has the sole interest, when such action operates to his prejudice.

DEBTOR AND CREDITOR—INSOLVENCY—MARSHALING ASSETS.—A person holding a judgment note of a merchant in failing circumstances, which is secured by mortgage on land, may obtain judgment by confession and levy on the debtor's stock of goods, and, upon subsequent voluntary assignment proceedings, he is entitled to be protected in his rights without requiring him to first resort to foreclosure.

DEBTOR AND CREDITOR—VOLUNTARY ASSIGNMENTS.
—JUDGMENT NOTES intended to create a preference in contemplation of a voluntary assignment for the benefit of creditors, executed contemporaneously with the deed of assignment and as part of the same transaction, are void.

EXECUTIONS—VARIANCE.—An execution issued on a judgment by confession in vacation, correctly describing the judgment and its date, but reciting that such judgment was recovered at a former term of court, is not void for variance, if such recital is a clerical error and may be regarded as surplusage.

Mills Brothers and Le Forgee & Lee, for the appellants.

I. A. Buckingham and H. Crea, for the appellee.

³¹⁴ PHILLIPS, J. On the thirteenth day of November, 1893, Albert F. Ross, a merchant at Decatur, executed a judgment note for six thousand dollars to the appellee, Fenton. Rebecca K. Ross, the wife of Albert F. Ross, joined in the execution of the note. The note was secured by a mortgage upon real estate in Decatur. On the fifth day of June, 1896, judgment was confessed on this note in the circuit court of Moultrie county, in vacation, for the sum of six thousand nine hundred and fifty-seven dollars and ninety-five cents, upon which judgment an execution was issued to the sheriff of Macon county, reaching his hands June 6, 1896, at about 4 o'clock P. M. This execution recited that the judgment was recovered "in the circuit court of the county of Moultrie, at a term thereof begun and held at Sullivan on the twentieth day of April, 1896, to wit, on the day of the date ³¹⁵ hereof, June 5, 1896, as of said term, by confession of said defendants, and which by the court was adjudged to the plaintiff for his damages herein." Immediately after the execution was placed in the hands of the sheriff a demand was made upon Albert F. Ross for payment, but no levy was made. On the following day (Sunday) Joseph A. Friedlander, of Cincinnati, representing his own firm and another firm who were creditors of Ross, arrived at Decatur in response to a telegram sent him by Ross. A conference was held between Ross, Friedlander, and James W. Race, a merchant of Decatur who had been called in by the parties. The question of the advisability of an assignment by Ross was discussed. In the afternoon of that day Ross executed judgment notes to Heidelberg, Friedlander & Co. and Levy, Price & Co. for the amounts due them, which notes were delivered to Friedlander, and at an early hour on the morning of June 8th judgments were confessed on these notes in the circuit court of De Witt county, and within a few hours afterward were placed in

the hands of the sheriff of Macon county. Shortly after midnight on the 7th Ross executed a deed of assignment to Race, which was filed for record the forenoon of Monday, June 8th. Levy was made by the sheriff of Macon county by virtue of the different executions in his hands, including those of appellants and appellee, but afterward, on petition of the assignee, the entire stock of goods was surrendered to him, all rights of execution creditors being saved. After the assignee had converted the goods into money, this controversy arose among the execution creditors concerning their priority, and the assignee having applied to the county court for an order directing him as to distribution, that court held that the appellee should be first paid. The court also held that the executions of appellants were void, on the ground that the notes and warrants of attorney upon which the judgments were confessed, having been issued contemporaneously with the deed of assignment, should ^{be} be taken and held as a part thereof and that appellants should be paid pro rata with the general creditors. On appeal from that order, the appellate court for the third district affirmed the order of the county court, whereupon this appeal was prosecuted to this court.

It is contended here that, the note of appellee having been secured by mortgage on real estate, he must first have resorted to that before maintaining the lien of his execution as against that of appellants; also, that there was a variance between the execution and the judgment upon which it was based, the judgment having been rendered in vacation and the execution having recited that it was rendered at the April term of the circuit court of Moultrie county; also, that the judgment notes of appellants, although executed about the time of the assignment, were not void.

The mere fact that the note of appellee was secured by a real estate mortgage would not preclude him from enforcing his lien upon this stock of goods. It does not appear from this record what was the value of the real estate mortgaged, or that this security was of value sufficient to satisfy the judgment of appellee. The county court would not be justified, in a case of this character, in withholding settlement with the assignee for the long period of time which would be necessary to enable the mortgagee to go into a court of equity, foreclose his mortgage, procure a decree of sale, await fifteen months' redemption, and then, perhaps, await a sale of the premises by the purchaser, should the mortgagee bid in the property, in order to deter-

mine how much should be realized from this security. While it is true the general rule is that where a party has a lien or interest in two funds and another party has a lien in only one of the same funds the party having the lien or interest in the two will be compelled by court of equity to first resort to the fund in which he has the sole interest, yet this rule will not be enforced where it operates to the prejudice of the ³¹⁷ party holding the double interest: *Brown v. Cozard*, 68 Ill. 178; *Matter of Bates*, 118 Ill. 524, 59 Am. Rep. 383; *Levy v. Chicago Nat. Bank*, 158 Ill. 88.

As to the contention of appellants that there is a variance between the execution and the judgment of appellee, we find no substantial variance. The judgment was in fact confessed in the circuit court of Moultrie county in vacation, on the fifth day of June. The recital in the execution is, that it was recovered in the circuit court of Moultrie county on the day of the date hereof, June 5, 1896, by confession, et cetera. The other recital as to the April term is a mere clerical error, which may be regarded as surplusage, and when it is so disregarded the execution correctly describes the judgment as having been rendered in vacation.

The record in this case clearly shows that the execution of the judgment notes in favor of appellants, and the execution of the deed of assignment to Race, were parts of the same transaction. The matter of the assignment was discussed by the judgment debtor, by appellants, and by the assignee. The evidence of Ross clearly shows these judgment notes to have been executed to appellants, at the request of Friedlander, as preferences, in contemplation of an assignment. Under such circumstances and under our statute the notes and the judgments rendered upon them were void: *Preston v. Spaulding*, 120 Ill. 208; *Hide etc. Nat. Bank v. Rehm*, 126 Ill. 461; *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584; *Illinois Paper Co. v. Northwestern Nat. Bank*, 149 Ill. 450.

The judgment of the appellate court for the third district affirming the order of the county court of Macon county was right, and it is affirmed.

DEBTOR AND CREDITOR—MARSHALING ASSETS.—To invoke the doctrine of marshaling securities, both sources of payment must belong to the common debtor. The duty is not invoked against the doubly secured creditor, but against the common debtor, and cannot be invoked against the common debtor if that course would trench upon the rights, or operate to the prejudice, of the creditor entitled to the double fund: *Blakemore v. Wise*, 95 Va. 269, 64 Am. St. Rep. 781, and note.

DEBTOR AND CREDITOR—PREFERENCES—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—A debtor may secure his creditor by a confession of judgment in his favor: *Braden v. O'Neill*, 183 Pa. St. 462, 63 Am. St. Rep. 761. An insolvent debtor may secure one creditor in preference to another, except when he executes an assignment for the benefit of his creditors: *Cutter v. Pollock*, 4 N. Dak. 205, 50 Am. St. Rep. 644.

EXECUTION.—MERE CLERICAL ERRORS and failure to recite the judgment with strictness do not avoid the execution. Such clerical errors are not material if the execution describes the judgment upon which it is based, so that it may be identified: *Note to Bernhardt v. Brown*, 65 Am. St. Rep. 780.

STORRS v. ST. LUKE'S HOSPITAL.

[180 ILLINOIS, 383.]

WILLS—CONTESTS.—THE LAW IN FORCE at the time of the filing of a bill to set aside the probate of a will governs the jurisdiction of the court to entertain the bill, and such jurisdiction is not governed by the law in force when the will was probated.

WILLS—CONTESTS—JURISDICTION.—Courts of equity have no inherent jurisdiction of a bill to set aside a will or its probate. Such jurisdiction is derived exclusively from the statute and can be exercised only in the mode and under the limitations prescribed thereby.

WILLS—CONTESTS—JURISDICTION—LIMITATIONS.—An appearance within the time limited by statute to contest the validity of a will or set aside the probate thereof is a jurisdictional fact, and is necessary to put the machinery of the court in motion, so as to contest the validity of the will. Such grant of jurisdiction is to be exercised only in case it is invoked within the time limited, and is not a limitation upon the exercise of a jurisdiction already existing.

WILLS—CONTESTS.—A PERSON NOT DIRECTLY AND PECUNIARILY INTERESTED in the estate of a deceased person at the time of the probate of the will of such decedent is not entitled to file a bill in chancery for the purpose of contesting the validity of such will.

WILLS—CONTESTS—RIGHT TO MAINTAIN, WHETHER ASSIGNABLE.—The right to maintain a bill to set aside a will and the probate thereof is not assignable, nor does it pass to an heir by descent or inheritance.

Tenney, McConnell, Coffeen & Harding, for the appellants.

L. Evans, for the appellee.

371 **MAGRUDER, J.** The only question involved in this case relates to the right of the present appellants, who were complainants below, to file this bill to set aside the will of Caroline T. Storrs, and the probate thereof. The will was admitted to probate on July 18, 1888, and the present bill was not filed

until November 23, 1896, more than eight years after said probate.

The proviso to section 7 of the act in regard to wills, as passed in 1872, is as follows: "Provided, however, that if any person interested shall, within three years after the probate of any such will, . . . appear and by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury; . . . but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, femes covert, persons absent from the state, or non compos mentis, the like period after the removal of their respective disabilities," et cetera: 2 Starr and Curtis' Annotated Statutes, 2470.

In 1895 the legislature amended said section 7, and by the amendment substituted the period of two years for the period of three years, and omitted the words "femes covert, persons absent from the state": Sess. Laws 1895, p. 327.

In *Spaulding v. White*, 173 Ill. 127, we have held that the statute in force at the time of the filing of the bill is ³⁷² the statute which confers jurisdiction on the court to entertain a bill to contest the validity of a will, and that such statute, and not the law in force when the will was probated, must control and govern such jurisdiction. If, therefore, any right existed in the present appellants, or either of them, to file this bill, the time within which the same should have been filed would be governed by the amendatory act of 1895.

The doctrine is well established in this state that courts of equity, independently of the statute, have no jurisdiction of a bill to set aside a will, or its probate. The jurisdiction of courts of chancery in this state to entertain such bills is derived exclusively from the statute, and, therefore, such jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute. If "any person interested" shall, within three years after the probate, et cetera, or, as the law of 1895 requires, within two years after the probate, et cetera, appear, and, by bill in chancery, contest the validity of the will, an issue at law shall be made up, et cetera; but if such person does not appear within the time limited, an issue at law cannot be made up. The appearance within the time limited is a jurisdictional fact, and is necessary to put the machinery of the court in motion, so as to contest the validity of the will. The proviso of section 7 is merely a grant of jurisdiction, to be ex-

exercised only in case it is invoked within the time limited, and not a limitation upon the exercise of a jurisdiction already existing. In other words, the statute fixing the time within which such a bill may be filed by "any person interested" is not a limitation law: *Luther v. Luther*, 122 Ill. 558; *Wheeler v. Wheeler*, 134 Ill. 522; *Sinnet v. Bowman*, 151 Ill. 146; *Jele v. Lemberger*, 163 Ill. 338; *Spaulding v. White*, 173 Ill. 127.

In construing the statute, we have also held that the words, "any person interested," as used in the proviso to said section 7, mean those persons who are interested in the settlement of the estate, that is to say, those who ³⁷³ will be directly affected in a pecuniary sense by its settlement; that the interest must be a direct pecuniary interest affected by the probate of the will, as the reference is to an existing interest, and not to an interest which may be subsequently acquired. A person not directly and pecuniarily interested in the estate of a deceased person at the time of the probate of the will of such decedent is not entitled to file a bill in chancery for the purpose of contesting the will: *McDonald v. White*, 130 Ill. 493; *Jele v. Lemberger*, 163 Ill. 338.

In *Luther v. Luther*, 122 Ill. 558, the will there under consideration was admitted to probate on September 27, 1875, and the bill to contest its validity was not filed until nearly ten years afterward, to wit, on September 1, 1885; and it was there charged that the testator had been induced to make the will by fraud, falsehood, and misrepresentation, and that the complainants did not learn of the testator's unsoundness of mind and memory, nor of the fraud and undue influence practiced in obtaining the will, until March, 1884, and that the cause of action set up in the bill was fraudulently concealed by the defendants therein from the complainants, until within three years before the filing of the bill. It was contended in the *Luther* case that the limitation should only begin to run from the discovery of the fraud, upon the ground that, according to the usual rule in equity, where a party has concealed his fraud, he is estopped from setting up the statute of limitations: *McIntosh v. Saunders*, 68 Ill. 128. But as the statute was there held to be not a statute of limitation, its requirement that the bill should be filed within the time limited was held to be imperative, and the failure to file it within such time was held not to be excused by fraud and concealment, so urged and set up.

In *McDonald v. White*, 130 Ill. 493, the bill to contest the will was filed within three years from the probate of the will,

but by a person who had purchased the inheritance of one of the heirs after the death of the testatrix; and it ³⁷⁴ was there held that such assignee of the heir could not maintain the bill. In the McDonald case we said: "Appellants were not interested in the probate of this will. They were deprived of nothing by it. Their interest was derived by purchase long subsequent to the probate of the will, and is, therefore, not such as is within the contemplation of the statute. Moreover, James M. McDonald never had possession of this property. He never had any apparent title to it. At most, all that he had was the bare right to establish title by successfully contesting this will. But such a right is not assignable, and cannot, therefore, be the subject of a conveyance": Norton v. Tuttle, 60 Ill. 130; Illinois Land etc. Co. v. Speyer, 138 Ill. 137.

If we apply the principles thus announced to the facts of this case, it clearly appears that the present appellants cannot maintain the bill, and that the demurrer thereto was properly sustained by the court below. The will of Caroline T. Storrs, the validity of which is here attacked, was admitted to probate on July 18, 1888. Her son, George M. Storrs, who was interested in the estate as one of the devisees under the will, had the right to file a bill to contest it at any time within three years after July 18, 1888. He did not do so. The bill, however, alleges that he was insane or non compos mentis from 1888 to the time of his death in July, 1896. Under the statute he would have been entitled, within three years after the removal of the disability created by his lunacy, to file a bill to contest the will. But he died before the disability was removed, and while it existed. The question then arises, whether Emery A. Storrs, alleged to be his son, could file this bill after his father's death.

The present appellant, Emery A. Storrs, does not come within the definition of "any person interested," as used in the statute. He certainly had no interest at the time of the probate of the will. The fifth paragraph of the will provides that, in the event that George M. Storrs ³⁷⁵ should enter into the bonds of matrimony subsequently to the making of the will of Caroline T. Storrs, and should have issue by such subsequent marriage, then the trustees should, upon the death of George M. Storrs, make a transfer to such heir. The bill, however, avers that the appellant, Emery A. Storrs, was a year old at the date of the will, and was the offspring of a marriage which had taken place before that time. He is not, therefore, such an heir as is mentioned in the fifth clause of the will.

The right to file the bill, which existed in George M. Storrs, did not descend to the appellant, Emery A. Storrs. George M. Storrs had the bare right to establish title by successfully contesting the will. That right was not assignable, as was held in *McDonald v. White*, 130 Ill. 493. If it was not assignable by a conveyance or written transfer, it could not pass by inheritance or descent. The right to dispose of property by will is always considered purely a creature of statute: *United States v. Perkins*, 163 U. S. 625; *Kochersperger v. Drake*, 167 Ill. 122. No statute exists in this state, so far as we are advised, which authorizes the right to file such a bill to pass by descent, or to go to an heir by inheritance. The right of a widow to dower does not survive to the administrator: *Hitt v. Scammon*, 82 Ill. 519. An action to recover a statutory penalty does not survive the death of the defendant: *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

We are, therefore, of the opinion that the appellant, Emery A. Storrs, had no such interest at the time of the probate of the will as would entitle him, in view of the decisions above quoted, to file a bill to contest its validity at the date at which the present bill was filed; and that such right as his father, George M. Storrs, had to file such a bill did not pass to him by descent. Whether or not George M. Storrs could have filed a bill, within the time limited by the statute to contest the validity of the will, through a conservator or next friend during his insanity, ²⁷⁸ is a question which it is not necessary here to determine, as it does not arise upon this record.

The other appellant, the Chicago Title and Trust Company, administrator de bonis non of the estate of George M. Storrs, was not a proper party complainant here, because it had not such an interest as is contemplated by the statute. The administrator de bonis non merely holds his title in autre droit, as trustee, for the purpose of distribution: *Schouler's Executors and Administrators*, sec. 242.

Accordingly, the judgment of the appellate court is affirmed.

Cartwright, C. J., and Boggs, J., dissenting.

WILLS — CONTESTS — JURISDICTION — EQUITY.—Courts of chancery in England have no power to determine the validity of a will of either real or personal property: *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118. The question whether a will ought to be approved and allowed is one of purely probate jurisdiction: *Small v. Small*, 4 Greenl. 220, 16 Am. Dec. 253.

WILLS—WHO MAY CONTEST.—The rulings in courts have been somewhat at variance as to what interest is necessary to admit a

person to contest a will. It has been held in England, and followed in some of the United States, that any interest, and even the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper: *Note to Meyer v. Fogg*, 68 Am. Dec. 447; *Watson v. Alderson*, 140 Mo. 833, 69 Am. St. Rep. 615.

CATLIN COAL COMPANY v. LLOYD.

[180 ILLINOIS, 398.]

ESTATES—POSSESSION OF SURFACE DOES NOT CONSTITUTE POSSESSION OF MINERALS UNDERNEATH IF SEVERED.—If the title to the surface of land has been severed from the title to coal and mineral underneath, in place, the possession of the surface does not carry with it the possession of such coal and mineral.

ADVERSE POSSESSION OF SURFACE DOES NOT CARRY MINERAL THEREUNDER.—Possession of the surface of land and residence thereon for the statutory period of limitation do not convey title to coal and mineral thereunder in place, if the title to the surface and to the mineral has been previously severed, although the deed under which possession is held makes no reservation of such coal and mineral.

DEEDS—INTERLINEATIONS OR ERASURES—PRESUMPTION.—The mere fact of an interlineation or an erasure appearing in a deed or other instrument does not, of itself, raise any presumption of law either for or against the validity of the writing, and the question when, by whom, and with what intent it was made is one of fact to be submitted to the jury.

DEEDS—INTERLINEATIONS OR ERASURES—BURDEN OF PROOF.—An alteration or interlineation in a deed or other instrument must be explained by the party claiming the benefit of the paper, and if it is suspicious in appearance, and a satisfactory explanation is not made, the proper conclusion is against the instrument.

DEEDS—CONSIDERATION—EFFECT OF ERASURES.—A deed made under a statute requiring a valuable consideration to support it, but from which considerations first inserted have been wholly erased, and such erasures not explained, leaving it wholly without any expressed consideration, is not sufficient foundation for a claim of title.

J. W. Calhoun, H. M. Steely, and J. M. Mann, for the appellant.

Lawrence & Lawrence, for the appellee.

³⁹⁸ **CARTWRIGHT, C. J.** Appellee had a judgment in ejectment in this case against appellant for the possession of an undivided five-sixths of the coal and minerals underlying the east half of the southeast quarter of section 34, in township 19 north, range 12 west, in Vermilion county. We reversed the judgment and remanded the cause to the circuit court for further proceedings in conformity with the opinion then filed: *Catlin Coal Co. v. Lloyd*, 176 Ill. 275. After the cause was re-

instated in the circuit court, the plaintiff, by leave of court, amended his declaration by striking out "the undivided five-sixths," and adding, "the east half of the southwest quarter and the southwest quarter of the southwest quarter of section 35," in the same town and range, so as to claim title to the whole of said first tract and one hundred and twenty acres additional. To this amended declaration a plea of the general issue was filed, and there was a trial, ending with a verdict in favor of plaintiff. After the verdict, on a motion for a new trial, plaintiff was permitted to again amend his declaration by striking out a portion of the lands in the first tract. The motion for a new trial was overruled, and judgment was entered that plaintiff was owner in fee simple, and that he recover from the defendant the following premises, and the possession thereof, with costs of suit, to wit: "All of the east half of the southeast quarter of section 34 south of railroad, and east half of southwest quarter and southwest quarter of southwest ⁴⁰⁰⁰ quarter of section 35, town 19, range 12 west, in Vermilion county, Illinois."

At the trial both parties claimed title, as before, from Harvey Sandusky, who was conceded to have been the owner in 1863. It was also proved, as it was on the former trial, that said Harvey Sandusky had conveyed the coal and mineral underlying said lands in 1863 or 1864 by one or the other of the deeds hereinafter mentioned, duly executed by himself and wife and recorded, and thereby severed the estate in the coal and mineral from the estate in the surface, and that after such severance he had no interest in the estate so conveyed. In 1880, the plaintiff, who had acquired title in the surface, caused the estate in the coal and mineral under these lands to be assessed and taxed separately from the surface, and ever since that time they have been so assessed and taxed, and the plaintiff has not paid the taxes on the estate in the coal and mineral so assessed and taxed.

When the case was here before we considered and settled the question whether, after such severance, a possession of the surface of the land would carry with it a possession of the coal and mineral in place thereunder, and we held, upon a review of the authorities, that such possession of the surface would not constitute a possession of the separate estate in the underlying coal and mineral. Nevertheless, at the second trial plaintiff claimed title to the coal and mineral by possession of the surface for seven years under section 4 of the act in regard to limitations, which is as follows: "Actions brought for the recovery of any

lands, tenements, or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on ⁴⁰¹ execution, or under any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title": Rev. Stats., c. 83, sec. 4.

Plaintiff had been in possession of the surface of the land, but disclaimed any title under any other section of the limitation act than this section. To sustain the title so claimed by limitation, he proved that Harvey Sandusky was adjudged a bankrupt; that James C. Lake, registrar in bankruptcy, conveyed to Joseph G. English, assignee of said bankrupt, March 23, 1872, by general deed, all the estate, real and personal, that Harvey Sandusky had on August 25, 1871, and that the district court of the United States, by its order, authorized said assignee to sell all of the real estate of said Harvey Sandusky. He also offered in evidence a deed dated April 22, 1873, from said Joseph G. English, assignee of Harvey Sandusky, bankrupt, to Abraham Sandusky and William Sandusky, conveying the lands described in the amended declaration, in pursuance of a sale thereof under the said order. He also offered two deeds from William Sandusky and wife and Abraham Sandusky and wife to him—one dated March 10, 1876, for the east half of the southeast quarter of section 34 and the west half of the southwest quarter of section 35, and the other dated March 13, 1880, for the east half of the southwest quarter of section 35, all in township 19, range 12 west. These deeds were accompanied by proof that William and Abraham Sandusky had possession of the surface after their purchase, and that plaintiff had possession of the surface of the several tracts from the dates of his deeds, respectively, and that he resided on the same on the west eighty of section 34.

Section 4 of the limitation act, under which plaintiff claimed, requires possession of the premises and estate sought to be recovered, and he could not establish title ⁴⁰² to them under that section without possession. In *Martin v. Judd*, 81 Ill. 488, it was said, concerning the same language used in this sec-

tion: "But the party having title deducible of record must have possession, and as there are various methods of acquiring and holding possession of real estate, the act advanced one step, and required that the possession must be held in a particular manner—that is, by actual residence upon the land." The evidence proved that there were two estates held by separate and distinct titles in severalty, and in such case a possession of the surface does not extend to a possession of the other estate, nor does the possession of the estate in the coal and mineral extend upward to embrace the other estate. The evidence did not prove possession by plaintiff of the coal and mineral. The deed from the registrar to the assignee conveyed nothing but the interest which Harvey Sandusky had at the time of his bankruptcy, and the assignee could convey and the purchaser take no greater rights than were possessed by the bankrupt. It is not pretended that Harvey Sandusky had any right, interest, or title to the coal, or any part of it. On the contrary, it was conceded by both parties on the trial that he had parted with the coal many years before, and had severed that estate from the title generally, by his deed. The deed from the assignee to William Sandusky and Abraham Sandusky, and their deeds to plaintiff, did not serve to reunite the two estates in the plaintiff, but they remained separate as before. Plaintiff was in possession only of the estate conveyed to him, and defendant could not have brought an action against him within seven years next after he took such possession, or at any other time, as contemplated by the statute.

The view of the trial court was explained to the jury by the third instruction, and it was, in substance, that although in a case of this kind the actual possession of the owner of the surface will not constitute possession of the coal and mineral beneath the surface, yet if the ⁴⁰³ deed from the assignee, under the order of the district court, made no exception or reservation of the coal and mineral, and the grantees under such deed resided on the land seven years, during which no action was brought by any other person to recover the possession of the coal and mineral and no other person actually entered upon and took possession of the coal and mineral, then title in fee simple would be acquired under the limitation act. The instruction was wrong. Title could not be acquired under the limitation act without possession, no matter what the deed purported to convey. If possession of the surface would not constitute possession of the coal and mineral under one section of the statute,

it would not under another. If a grantee of Harvey Sandusky of the same premises could never have possession of the coal and mineral by occupying the surface, we do not see how possession could be so acquired under a conveyance from his assignee or under an order of court. It makes no difference, as to the fact of possession, whether it is under a deed from one person or from another or by authority of court. Where the titles are separate and distinct and have not been reunited, each is incapable of possession by the mere occupancy of the other.

Each of the parties claimed record title from Harvey Sandusky to the coal and mineral underlying that part of the east half of the southeast quarter of section 34 south of the railroad. The defendant read in evidence a deed from said Harvey Sandusky dated May 10, 1864, and by a chain of conveyances proved title to the coal and mineral under all the lands in question; but the plaintiff offered in evidence a deed from said Harvey Sandusky to Josiah Sandusky of the coal and mineral under this tract, dated December 14, 1863, which was prior in point of time to the deed under which defendant claimed. This deed to Josiah Sandusky was objected to, when offered in evidence, on account of several erasures and alterations. In the place for the consideration there had been the ⁴⁰⁴ words "four thousand three hundred," and they had been erased by drawing a line through them. Immediately above them were interlined the figures "\$750.00," erased in like manner, and on the left-hand margin opposite the same line there were the figures "\$1,000.00," also erased by the same method. In the description of the lands there was also an erasure of the words and figures "nineteen (19)" and there was interlined above them "eighteen." The objection was overruled and the deed admitted in evidence. There was no direct proof when or by whom or with what intent the erasures or alterations were made, and they were not noted in any way on the instrument.

Josiah Sandusky died thirty years ago, leaving heirs, and neither he nor his heirs ever paid any taxes or were in possession, or, so far as appears, ever made or asserted any claim to title under the deed. Quitclaim deeds of these heirs to said William and Abraham Sandusky were offered in evidence to connect plaintiff with the altered deed, under the claim that the title would inure to him by virtue of the covenants of warranty, and it appeared that as to two of these quitclaim deeds, at least, they were loaned for the purpose of the lawsuit, under the agreement that if they were of any value in the suit the

heirs were to be paid what they were worth, and in case they were not of any value there was to be no pay. Relative to the deed bearing the alterations and erasures, the court instructed the jury that being prior in point of time to the title of defendant it was the superior title, provided the jury believed the deed was a valid deed, and that the alterations appearing on its face were made before its delivery, or were made without any intent to defraud or injure any person, and that the jury had the right to determine, under the proof and circumstances, when the apparent changes in it were made, by whom, and the intent with which made. While the instruction referred the jury to the evidence for explanation of the apparent alterations, there was none which tended in ⁴⁰⁵ any way to explain them, but such evidence as there was tended to prove that the deed was not regarded as valid by the grantee or his heirs, since neither he nor they ever took possession or claimed anything under it.

It is argued on one side that the court erred in admitting the deed in evidence, because the law presumes the alterations to have been made after its execution, and plaintiff was bound to explain the alterations and erasures satisfactorily before it was admitted in evidence. On the other hand, it is contended that, where nothing to the contrary appears, the alterations are presumed, in law, to have been made at the time the deed was executed. There have been many different expressions in different jurisdictions concerning the presumption in such cases in absence of proof. The question has been considered in this court, and the rule has been adopted which the learned author of the article on alteration of instruments in 2 American and English Encyclopedia of Law, second edition, page 274, says is best supported by reason and to which the authorities seem tending. It is that the mere fact of an interlineation or an erasure appearing in an instrument does not, of itself, raise any presumption of law either for or against the validity of the writing, but that the question when, by whom, and with what intent it was made is one of fact to be submitted to the jury. In *Gillett v. Sweat*, 1 Gilm. 475, it was said: "The law upon that subject is, that if any ground of suspicion is apparent upon the face of the instrument the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom it was done, and the intent with which the alteration was made, as matters of fact to be found by the jury." In *Walters v. Short*, 5 Gilm. 252, the court refused to adopt the presumption that the alteration was contemporaneous with the

execution of the instrument, but left it to be explained by inspection of the instrument, with other evidence, as a question of fact. In *Reed v. Kemp*, 16 Ill. 445, these cases were reviewed and ⁴⁰⁶ the question considered, and it was decided that there is no presumption of law whether an instrument has been altered from its condition when executed, but that it is a question of fact, and that the party producing such an instrument is called upon for explanation. In subsequent cases the presumption is sometimes spoken of as one of law, but in view of these decisions it must be regarded as a question of fact. In dealing with it as such a question, however, the court has uniformly required that the alteration or interlineation shall be explained by the party claiming the benefit of the paper, and, if it is suspicious in appearance and satisfactory explanation not made, the proper conclusion is a conviction of fact against the instrument: *Hodge v. Gilman*, 20 Ill. 437; *Pyle v. Oustatt*, 92 Ill. 209; *Montag v. Linn*, 23 Ill. 551.

An inspection of the deed might be sufficient to show that the change in the description was before or at the time of the execution, since it made the number of the township harmonize with the previous number given in the deed. The erasures of the consideration, however, were not only not explained, but they left the deed without any consideration, and there was no proof of any. It was made December 14, 1863, and is the ordinary deed of bargain and sale in use at that time. Such a deed required a valuable consideration to support it: 6 Am. & Eng. Ency. of Law, 2d ed., 683; 9 Am. & Eng. Ency. of Law, 2d ed., 102; 2 Blackstone's Commentaries, 296; Devlin on Deeds, sec. 23; *Wood v. Beach*, 7 Vt. 522; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62. There is no ground for saying that the word "dollars," which still appears in the deed, was intended to represent any consideration. Three separate amounts which were written in as the consideration have all been erased, showing a clear intention to strike out all consideration from the deed. It was left absolutely without the consideration required by law to support it, either expressed on its face or proved by other evidence. It was insufficient as a foundation for plaintiff's claim of title as to the tract of land mentioned in it, if it ⁴⁰⁷ should be held that he connected himself with it by the quitclaim deeds before mentioned.

Various other questions are raised and argued, but we see no reason for considering them, because the finding of the jury was palpably wrong under the evidence and the court should have granted a new trial.

The judgment of the circuit court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

ESTATES.—A CONVEYANCE RESERVING TO THE GRANTOR ALL MINES, MINERALS, AND METALS in and under the land does not pass to the grantee any natural gas or coal or petroleum oils constituting a part of such land: *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740.

ADVERSE POSSESSION—MINERALS.—Possession of the surface of land for more than twenty-one years does not carry with it the possession of minerals below it, where the title to the latter had been severed from that of the surface by deed: *Note to Murray v. Allred*, 66 Am. St. Rep. 752.

DEEDS—INTERLINEATION—PRESUMPTION.—If an interlineation in a deed is in the same handwriting as the body, and accords with the manifest object of the deed, a fair presumption is, that it was made before the acknowledgment of execution, and the burden of repelling this presumption must be assumed by the person seeking to avoid the deed: *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82. That erasure or interlineation on the face of a deed does not of itself necessarily avoid it, see *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621; *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202.

DEEDS—INTERLINEATION—BURDEN OF PROOF.—Apparent and material alterations in a writing must be explained by the party who offers it in evidence: *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371.

CLARK v. GLOS.

[180 ILLINOIS, 556.]

JUDGMENTS—MERGER.—If a judgment is a lien upon two pieces of land, a person who has taken a deed from the judgment debtor of one of the pieces of land and afterward obtained an assignment of the judgment to himself may enforce the judgment against the piece of land, the title to which remains in the judgment debtor, or a prior grantee from him subject to the judgment. In such case, the judgment does not merge in the purchase of one of the pieces of land.

JUDGMENTS—MERGER.—A judgment is a general lien upon all of the debtor's real estate, and does not merge when the judgment creditor acquires title to a particular portion of such lands, but may, in ordinary cases, be enforced against the remaining lands belonging to the debtor.

JUDGMENTS—MERGER—ASSIGNMENT.—The rule that an assignment of a judgment to the owner of property works a merger of such judgment does not apply to a grantee of the judgment debtor, unless such grantee takes the conveyance subject to the judgment, and agrees to pay it as part of the consideration.

JUDICIAL SALES—LACHES IN MOVING TO SET ASIDE. An application to set aside a sheriff's sale for an irregularity which makes the sale merely voidable must be made within a reasonable time, and at least within a period less than twenty years from the time of the sale.

JUDICIAL SALES—SETTING ASIDE—LACHES.—If a judgment debtor, or a grantee holding title from him, at the time of a sheriff's sale, shows no excuse for his delay in objecting to the sale until after it has been consummated and the purchaser thereat has conveyed to a third party buying in good faith, such debtor or grantee is not entitled to have such sale set aside.

JUDICIAL SALES—RIGHTS OF BONA FIDE PURCHASERS.—A court of equity cannot interfere with a purchaser for value from the holder of a sheriff's deed, unless such purchaser can be charged with fraud or other inequitable conduct or notice thereof connected with the sheriff's sale.

JUDICIAL SALES—SETTING ASIDE COLLATERAL ATTACK.—If the court rendering judgment is not called upon to set aside a sale thereunder by the execution defendant or his grantee holding the title when the sale was made, a court of equity cannot inquire into or set aside the sale at the instance of a stranger, upon collateral attack, for defects rendering the sale merely voidable.

JUDICIAL SALES—SETTING ASIDE—IRREGULARITIES—LACHES.—Failure to sell land subject to a judgment lien in the inverse order of alienation of the several parcels thereof by the judgment debtor is an irregularity rendering the sale voidable, but not absolutely void, and an objection to the validity of the sale on that ground may be lost by delay.

JUDICIAL SALES—SETTING ASIDE—INADEQUACY OF PRICE.—A judicial sale cannot be set aside for mere inadequacy of price, unless that is so small as to amount to evidence of fraud.

JUDICIAL SALES—SETTING ASIDE—LACHES.—Objections to a judicial sale upon the ground that the property levied upon was sold en masse, and that the prices realized were inadequate, are objections which, at most, merely make the sale voidable; and application to have the sale set aside because of such objections must be made by motion, before the right of redemption has expired, in the court from which the execution was issued. The right to make such motion may be lost by delay.

JUDICIAL SALES—SETTING ASIDE—LOSS OF REMEDY. If a judgment debtor or his grantee, having an ample remedy by motion to set aside a judicial sale for mere irregularities, fails to avail himself of such remedy, equity cannot grant relief, unless he makes a strong case of fraud, wrong, or oppression.

A. Clark, pro se, for the appellant.

E. J. Price, for the appellees.

563 **MAGRUDER, J.** Two main questions are presented by the record before us. One relates to the title acquired through the sheriff's sale under the judgment against Ladd. The other has reference to the extent of the interest acquired by the appellee under the deeds executed by Charles B. Hosmer and Edward D. Hosmer.

The appellee claims that she acquired a good title to the property through the sheriff's deed executed to Charles B. Hosmer, the purchaser at the sheriff's sale.

1. The first objection made by the appellant to the title derived from the sheriff's sale, is, that when that sale was made

the judgment had been extinguished by merger, and that, therefore, the sale under it was void. This contention grows out of the following state of facts: In March or April, 1875, Ladd, the judgment debtor, conveyed to Pierson certain lands other than the lots here in controversy. Before Ladd conveyed these lands to Pierson, to wit, on February 13, 1875, Ladd had conveyed the eight lots here in controversy to Thurlow. On October 13, 1876, the township trustees assigned the judgment against Ladd to Pierson. At that time the judgment was a lien upon the lots here in controversy, and also upon the lots conveyed to Pierson subject to the encumbrances upon the latter. It is claimed by the appellant that, when Pierson, holding the title to the land conveyed to him by Ladd, took an assignment of the judgment against Ladd, he occupied the position of both debtor and creditor, and thereby there was an extinction of the judgment, and a merger, which made a sale under the judgment absolutely void.

⁵⁸⁴ The trouble with the contention of the appellant upon this point is, that Pierson did not obtain from Thurlow or from Ladd a conveyance of the particular lots here in controversy. If Pierson had obtained from Thurlow, the grantee of Ladd, a deed of the eight lots involved in this suit, and thereafter had procured an assignment to himself of the judgment, which was a lien upon those lots, it would be a serious question whether a merger had not taken place. The present case would then be brought within the doctrine laid down in the case of *Donk v. Alexander*, 117 Ill. 330, which counsel for appellant refers to and relies upon. The question here presented, however, is whether, where a judgment is a lien upon two pieces of land, a party who has taken a deed from the judgment debtor of one of the pieces of land, and then afterward obtains an assignment of the judgment to himself, can enforce the judgment against the piece of land, the title to which remains in the judgment debtor (or a prior grantee from him), and of which such party did not obtain a deed to himself.

Black, in his work on Judgments, says: "Since a judgment is a general lien upon all the debtor's real estate, it does not merge when the judgment creditor acquires title to a particular portion of such lands, but may, in ordinary cases, be enforced against the remaining lands. In case the creditor should become the owner of the only piece of land belonging to the debtor, there would probably be a merger of the lien," et cetera: 1 Black on Judgments, sec. 480. In support of the text the

writer refers to the case of Caley v. Morgan, 114 Ind. 350. In the latter case, it was held that the purchaser of land is not estopped from buying a judgment against his grantor, existing at the time of the conveyance, and enforcing it against other lands, owned by the latter at the time of the rendition of the judgment or acquired by him afterward; and that in such case there is no merger of the lien. The facts in the case of Caley v. Morgan, 114 Ind. 350, are somewhat ⁵⁶⁵ complicated, and will not be here set forth; but a reference to that case, and to the cases therein referred to, will show that the rule laid down by Black is supported by authority.

It must be remembered, however, that here the judgment was not enforced against the lands in question by Pierson, but it was enforced by Charles B. Hosmer, to whom Pierson assigned the judgment. There is no evidence in the record that Hosmer, when he procured execution to be issued upon the judgment and levied upon the lots in question, had any knowledge or notice that Ladd had conveyed other portions of his property to Pierson. "Mergers are not . . . favored either in courts of law or in equity": 15 Am. & Eng. Ency. of Law, 314. It has been said that, in order to effect a merger, there must be at least two estates in the same property, which have vested in the same person: 15 Am. & Eng. Ency. of Law, 314. Two estates in the lots here in controversy never vested in Pierson, for although, when he took an assignment of the judgment, it may be said that he thereby acquired a lien upon the lots, yet he did not acquire the fee simple title thereto, because such title was in Thurlow, who obtained it by deed from Ladd on February 13, 1875, and never parted with it, until he executed a quitclaim deed to the present appellant on August 27, 1890. It has also been said that, at law, when a greater and lesser, or a legal and equitable, estate coincide in the same person, the lessor or the equitable estate is immediately merged and annihilated: 15 Am. & Eng. Ency. of Law, 314. But here the lesser estate, to wit, the lien of the judgment, or the charge upon the land, was, after the assignment, in Pierson, but the fee simple title was in Thurlow, and therefore the greater and lesser estate did not coincide in the same person; so that the lesser estate, to wit, the lien of the judgment, was not immediately merged and annihilated. It is also a well-settled rule that, in equity, it depends upon the intention of the parties and a variety of other circumstances ⁵⁶⁶ whether or not a merger takes place. Equity will prevent or permit a merger, as will best subserve the pur-

poses of justice, and the actual and just intention of the parties. The fact that Pierson executed an assignment of the judgment to Charles B. Hosmer shows that he intended to keep it alive, and had no intention of causing its extinguishment by a merger. "If, after the ownership and the charge have become united, the party does any act which clearly shows that he regards the encumbrance as still subsisting, this is strong, even if not conclusive, evidence of an intent that there should be no merger": 2 Pomeroy's Equity Jurisprudence, sec. 792, note 2. Again, "an assignment of a mortgage to a grantee of the mortgagor, unless he has expressly assumed to pay it and thus made himself the principal debtor, does not generally create a merger": 2 Pomeroy's Equity Jurisprudence, sec. 793. Here, there was an assignment of the judgment to Pierson, a grantee of the judgment debtor, but there is no evidence that Pierson expressly assumed to pay the judgment, and thereby made himself the principal debtor. The rule that an assignment of the encumbrance or charge to the owner of the property works a merger thereof does not generally apply to a grantee of the mortgagor or judgment debtor, unless the latter takes a conveyance of the lands subject to the mortgage or judgment, and expressly assumes and promises to pay it, as a part of the consideration; because he is thereby made the principal debtor, and the land is the primary fund for payment, so that if he pays off the charge it becomes extinguished: 2 Pomeroy's Equity Jurisprudence, sec. 797. In *Donk v. Alexander*, 117 Ill. 330, where the judgment of the appellate court was affirmed, we stated that we found no reason to disagree with the appellate court in its conclusions as to the law and the facts announced in its opinion; and, when we refer to the opinion of the appellate court in that case, we find that the decision of the court is placed mainly upon the obligation ⁵⁶⁷ of the assignee of the judgment to pay it: *Donk v. St. Louis Glucose etc. Co.*, 17 Ill. App. 369.

Before the lots in controversy here were sold under the judgment assigned to Charles B. Hosmer, it may be that Thurlow could have raised the question of Hosmer's right to have execution on the judgment. But the assignee of a judgment may enforce the same. When a person pays a judgment creditor the amount of his judgment against another and takes an assignment, the judgment is not necessarily thereby satisfied. It still remains in force against the debtor and beneficially in favor of the purchaser thereof; and the latter may issue the process of the law in the name of the judgment creditor to obtain

satisfaction: *McHany v. Schenk*, 88 Ill. 357. Upon the facts here presented, the sale, made under the judgment at the instance of Charles B. Hosmer, was not void, but at most only voidable; consequently, the sale is not now open to collateral attack: *Caley v. Morgan*, 114 Ind. 350.

Although Thurlow obtained his deed from Ladd, the judgment debtor, on February 13, 1875, he remained inactive and silent for over fifteen years, until he executed a quitclaim deed to appellant on August 27, 1890; and appellant made no application to have the sale set aside until the filing of his cross-petition herein on June 22, 1898, more than twenty years after the sale took place. An application to set aside a sheriff's sale for an irregularity, which makes the sale merely voidable, should be made at an earlier period than it has been made in the case at bar. Thurlow could have applied by motion to the court rendering the judgment to set the sale aside; he not only failed to do so, but, after the sale was made and the sheriff's deed was executed to the purchaser, he neglected to file a bill in chancery to set the same aside for the long period of time already referred to. It may not be ground for denying equitable relief that the judgment debtor or his grantee has omitted to apply by motion to have an irregularity of this character corrected ^{see} until the time for redemption has expired, still a much stronger case must be made to authorize the court to grant the relief, when there has been so long a delay as is shown by the present record. No excuse is here given why the application to set the sale aside was not made at an earlier date. Where a judgment debtor, or a grantee holding title from him at the time of a sheriff's sale, shows no excuse for his delay in objecting to the sale, until after it has been consummated and the purchaser thereat has made conveyance to a third party buying in good faith, such debtor or grantee is not entitled to have the sheriff's sale set aside: *Richey v. Merritt*, 108 Ind. 347.

So far as the present record shows, the appellee was a bona fide purchaser of the property from Edward D. Hosmer, holding under the purchaser at the sheriff's sale. Appellee obtained her deed on June 8, 1891; and, being an innocent purchaser without notice of the irregularity here complained of, she was not affected thereby. A court of equity will not interfere with a bona fide purchaser from the holder of a sheriff's deed, unless such purchaser can be charged with fraud or other inequitable conduct connected with the sheriff's sale, or, at any rate, can be charged with notice of such inequitable conduct: *Hay v.*

Baugh, 77 Ill. 500; McHany v. Schenk, 88 Ill. 357. There is no evidence here showing any fraud on the part of the appellee. Therefore, whatever remedy Thurlow may have had against the original purchaser at the sheriff's sale, if he had made his application in time to have the same set aside, he is without remedy at this late day against the appellee.

Moreover, as the court rendering the judgment was not called upon, either by the defendant in the execution or by the purchaser from the judgment debtor who held the title to the property when the sale was made, to set the proceeding aside, such proceeding cannot be disturbed at the instance of a stranger upon a collateral attack. Here, the appellant, as holding under a deed executed to ~~540~~ him by Thurlow, is a stranger to the record, and, therefore, at his instance, a court of equity will not inquire into and declare a sale invalid for a defect, which, at most, made it voidable only, and not absolutely void: Dobbins v. Wilson, 107 Ill. 17; Durham v. Heaton, 28 Ill. 264; 81 Am. Dec. 275.

2. It is claimed on the part of the appellant that the sale of the lots under the judgment was invalid, because the lots or tracts upon which the judgment was a lien were not sold in the inverse order of alienation. It is well settled that a court of chancery may compel a judgment creditor to exhaust all the property held by his debtor before he shall resort to property sold by the debtor, but subject to the lien of the judgment: Hurd v. Eaton, 28 Ill. 122. So, also, the judgment creditor may be compelled to sell a tract last sold by the judgment debtor before selling a tract first transferred by the judgment debtor, where both tracts are subject to the lien of the judgment. If the doctrine in relation to sales in the inverse order of alienation be applied to the facts of the present case, then a court of chancery might have compelled Hosmer, the assignee of the judgment, to first make sale of the land transferred in March or April, 1875, by Ladd to Pierson, before making sale, under the judgment, of the lots here involved, which were theretofore transferred by Ladd to Thurlow, to wit, on February 13, 1875. This doctrine, however, is subject to the qualification that the judgment creditor had notice of the fact of alienation. If a purchaser of land from one against whom there is a judgment desires to have other lands of his grantee first levied upon and sold to satisfy the judgment, it is his duty to give notice of his interest in the property bought by him, and to point out such other property, that the creditor may

have it taken in execution: *Dobbins v. Wilson*, 107 Ill. 17; *Richey v. Merritt*, 108 Ind. 347. Where several tracts of land are included in the same mortgage, and there have been subsequent sales by the mortgagor, a purchaser from the mortgagor desiring ⁵⁷⁰ that the sales under the mortgage shall be made in the inverse order of alienation must give actual notice of his rights before any sale is made under the mortgage, and, after the sale has been made without such notice having been given, he can have no relief: *Hosmer v. Campbell*, 98 Ill. 572. The notice here required must be actual, and not constructive, notice: *Hosmer v. Campbell*, 98 Ill. 572; *Matteson v. Thomas*, 41 Ill. 110. As has already been stated, there is no evidence here that Charles B. Hosmer, at the time of the sale made by the sheriff under the judgment assigned to him, had any notice of the transfer of other property in March or April, 1875, by Ladd to Pierson. It was the duty of Thurlow, if he had knowledge of such transfers by Ladd to Pierson, to give notice thereof to the sheriff, or to Hosmer, before the lots were sold at sheriff's sale. At any rate, he should have applied in apt time to the court from which the execution issued to have the levy and sale upon these lots set aside. His remedy in such case is complete at law by motion: *Morgan v. Evans*, 72 Ill. 586, 22 Am. Rep. 154; 2 Freeman on Executions, sec. 309. In *Watt v. McGalliard*, 67 Ill. 513, where a decree was entered against a party for the payment of money and made a charge upon two tracts of land then owned by him, either one of which was sufficient to have satisfied the debt, and, after the decree and before sale, such party sold and conveyed one of the tracts to A, who never gave any notice of his purchase, and the master in chancery sold the same in satisfaction of the decree and costs, et cetera, it was held, on bill by the heirs of A to set aside the sale and master's deed, and for leave to redeem, that the objection that the other tract was not first sold came too late after the sale and its confirmation. Certainly, this objection comes too late here, inasmuch as Thurlow waited twelve years after the sheriff's sale before executing a quitclaim deed to the appellant, and the appellant himself waited eight years longer before asking the relief which he prays for by his cross-petition in this case. ⁵⁷¹ The failure to make the sale in the inverse order of alienation constituted such an irregularity as did not make the sale void, but merely made it voidable; and, therefore, the application to set it aside should have been made at an earlier date. It is a reasonable inference that Thurlow had notice in

due time of both the levy upon and sale of his property, and, having made no objection to its sale until after the lapse of so long a period, he waived his right to have it set aside on the ground that the proper order of priority was not observed in making the levy and sale. "Where a party has notice in time to prevent, by injunction or other proceeding, a sale of his land until parcels subsequently disposed of by the judgment defendant have been exhausted, but makes no objection until after the sale has been consummated, and shows no excuse for not doing so, he is estopped from asking to have the sale set aside on the ground that the proper priority was not observed": *Richey v. Merritt*, 108 Ind. 347.

3. The appellant also objects to the sale upon two other grounds: 1. That the lots here in controversy were sold by the sheriff en masse; and 2. That there was great inadequacy in the price of the lots realized at the sale.

It does not appear here that the sale of the lots was en masse. On the contrary, we find that the lots were sold separately, as required by the statute. In the return, made by the sheriff upon the writ of execution and venditioni exponas, he states that he sold at public vendue, "to the highest and best bidder at said sale, the property levied upon as aforesaid for the sum of eleven hundred and fifteen dollars as follows: Lots 19 and 20 marked 1 above for twenty-five dollars each; seven lots marked 2 above for five dollars each; lot 14 marked 3 above for ten dollars; ten acres marked 4 above for five hundred dollars; four lots marked 5 above for one hundred and thirty dollars each." The seven lots marked 2, and lot 14 marked 3, are the lots here in controversy; and the sheriff, in his return, states that he ⁵⁷² sold them separately each for so much. Again, in the certificate of sale issued by the sheriff to the purchaser at the sheriff's sale, the sheriff states that he sold at public vendue "all the right, title, and interest of said defendants in and to the following described tracts or lots of land, to wit, lots 19 and 20 in block 25, village of Ravenswood, for twenty-five dollars each; lots 1, 2, 3, 15, 16, 17, and 18 in block 5 of Merrill Ladd's addition to Evanston for five dollars each; lot 14 in block 1 of Iglehart's addition to Evanston for ten dollars; the south ten acres of the northeast quarter of the northwest quarter of section 5, township 40 north, range 14 east of the third principal meridian for five hundred dollars; lots 15, 16, 17, and 18 in block 32 in Evanston for one hundred and thirty dollars each, all of the above in Cook county, Illinois, to Charles B.

Hosmer for the sum of eleven hundred and fifteen dollars, said sum being the highest and best bid offered for said tracts or lots of land, the same having been first offered in separate tracts or lots without receiving any bid or bids therefor or for any part thereof."

The statement in the certificate of sale is inconsistent and contradictory. The sheriff first herein says that these lots were sold each for so much money, and then that they and other property were sold for an aggregate amount, having first been offered in separate lots without receiving any bid or bids therefor. This inconsistency or contradiction in the certificate of sale does not exist in the return upon the writ of execution and venditioni exponas. The master, to whom the cause was referred in the court below, states in his report that the inconsistency in the sheriff's certificate of sale arose from the careless use of a printed form, from which the statement of a sale for an aggregate amount without receiving separate bids was not erased. It was unquestionably the duty of the officer under the statute to offer the lots for sale separately. The presumption is, that a public officer does his duty in the absence of evidence to the contrary. Where, as here, there are two contradictory statements, ⁵⁷³ one as to the performance of an official duty in accordance with the law, and the other as to its performance otherwise than as directed by the statute, the court will indulge the presumption in favor of a compliance with the law. We are, therefore, of the opinion that the sheriff's certificate of sale was intended to make the statement that the lots were offered and sold separately. One of the objects of the requirement that the lots should be sold separately when they are susceptible of division is, that thereby the owner may be enabled to redeem a particular lot by paying the amount for which it was sold, without exercising his right of redemption as to the whole property. Here, the return on the execution and the certificate of sale both show that bids were made separately on the lots and were itemized therein; and thereby Thurlow was enabled to exercise his right of redemption upon each lot separately.

So far as the inadequacy of price for which the sale was made is concerned, it well settled that a judicial sale will not be set aside for inadequacy of price, unless the same is such as to amount to evidence of fraud: *Barling v. Peters*, 134 Ill. 606. There are here no circumstances tending to impeach the fairness of the sheriff's sale and the good faith of Charles B. Hos-

mer, the purchaser; and, therefore, mere inadequacy of price is not a sufficient cause for setting aside the sale.

Objections to a judicial sale upon the ground that the property levied upon was sold *en masse*, and upon the ground that the prices realized were inadequate, are objections which, at most, merely make the sale voidable. Consequently, applications to have the sale set aside because of such objections should be made by motion, before the right of redemption has expired, in the court from which the execution was issued. Where the judgment debtor or his grantee, thus having an ample remedy by motion to set aside the sale, fails to avail himself of it, he should be required to show a case which appeals ⁵⁷⁴ forcibly to equity for relief before the sale will be set aside. When the time of redemption has expired, an application to set the sale aside will not be entertained, unless the applicant can show a strong case of fraud, wrong, or oppression. The judgment debtor or his grantee has no right to lie by and permit the purchaser to obtain a deed, and then have the action of the officer in making the sale and deed abrogated. Irregularities such as are here complained of are such as the judgment debtor himself may insist upon, and therefore he may waive them by too great delay in applying to have the sale set aside. When he fails to act promptly, he will be presumed to have waived such irregularities. There can be no question of such waiver in the present case, where there has been so great a lapse of time and so long a delay: *Hay v. Baugh*, 77 Ill. 501; *Noyes v. True*, 23 Ill. 503; *Dobbins v. Wilson*, 107 Ill. 17; *McHany v. Schenk*, 88 Ill. 357; 2 *Freeman on Executions*, 309; *Morgan v. Evans*, 72 Ill. 586, 22 Am. Rep. 154; *Prather v. Hill*, 36 Ill. 402; *Jackson v. Spink*, 59 Ill. 404; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275.

The appellant in this case claims title through the deed from Ladd to Thurlow and the deed from Thurlow to himself. His claim of title is, therefore, through and under the judgment debtor. The appellee's claim of title is through the sheriff's sale made under the judgment against Ladd, which judgment was a lien upon the lots before Ladd conveyed to Thurlow. We are of the opinion that the sheriff's sale was valid and passed the title of Ladd, the judgment debtor, to Charles B. Hosmer, the purchaser at the sheriff's sale; and, therefore, whatever title passed from Ladd to Thurlow was cut off by the sheriff's sale.

4. The appellee assigns cross-errors. The main error com-

plained of by the appellee is, that the court below found the title to five-eighths of the property to be in appellee and to three-eighths to be in appellant. Appellee insists that she should have been declared by the ⁵⁷⁵decree of the court below to be the owner of the whole of the lots, instead of an undivided five-eighths thereof. Whether this contention is sound or not depends upon the construction to be given to the quitclaim deed executed by Charles B. Hosmer to Edward D. Hosmer on March 1, 1888, and the quitclaim deed, executed by Edward D. Hosmer to the appellee, Emma J. Glos, on June 8, 1891.

The proof shows conclusively that Charles B. Hosmer and his son, Edward D. Hosmer, were partners, and that Charles B. Hosmer held an undivided one-half of the title to the lots in trust for his son, Edward D. Hosmer. By the quitclaim deed dated March 1, 1888, Charles B. Hosmer conveyed to Edward D. Hosmer "all interest in the following described real estate, to wit, the equal undivided one-half of lots 2 to 31 inclusive, et cetera, . . . lots 1 to 3 inclusive and 15 to 18 inclusive in block 5 of Merrill Ladd's addition to Evanston; lot 14 in block 1 in Iglehart's addition to Evanston." It is evident that the words, "an equal undivided one-half," qualify and apply to the lots here in controversy, as well as to the other lots named in the deed. The description of the lots here in controversy is not preceded by a period, but by a comma, showing that the words, "undivided one-half thereof" were intended to apply to all the lots named in the deed. Therefore, Edward D. Hosmer obtained title from his father to an undivided one-half of the lots in question; and, under the will of his father, he obtained title to an undivided one-eighth thereof, making his interest an undivided five-eighths, which he conveyed to the appellee by the deed to her of June 8, 1891. Before the latter deed was made, to wit, on February 10, 1891, an inventory was filed in the probate court of Cook county in the matter of the estate of Charles B. Hosmer, which described an undivided one-half of these lots as belonging to the estate of Charles B. Hosmer. The proceedings in the estate of Charles B. Hosmer, including this inventory, were in the line of appellee's chain of title; and she ⁵⁷⁶thereby was affected with constructive notice of the fact that the estate of Charles B. Hosmer owned an undivided one-half of these lots. But the proof shows that, when the appellee obtained her deed from Edward D. Hosmer, her husband, Jacob Glos, acted as her

agent. Edward D. Hosmer swears that he told Jacob Glos that he owned only an undivided five-eighths of the property, having acquired one-half from his father by deed and one-eighth through his father's will. In this way appellee was not only chargeable with constructive notice, but also received actual notice that Edward D. Hosmer only owned five-eighths of the property. We are, therefore, of the opinion that the court below correctly held that the appellee was the owner of five-eighths of the property, and not of the whole of the same.

We do not deem it necessary to discuss the evidence in regard to possession. It is sufficient to say that the evidence does not show any legal possession of these lots by Ladd or Thurlow prior to August 27, 1890. At that date appellant took possession, but he had been in possession less than seven years when the original petition was filed herein on December 31, 1895. Appellant, therefore, had no possession which could be set up as a bar to the title of the appellee under the sheriff's deed.

So far as the question of accounting is concerned, no accounting was asked for by the appellant in his pleadings. No objection was made to the master's report, because it did not go into an accounting with reference to the subject of rents and profits collected, and improvements made, which matters are more properly before the court for consideration in a partition proceeding. Appellant, in offering certain testimony upon these subjects before the master, expressly stated that he made the offer for the purpose of showing his good faith, and for the purpose of showing alleged laches on the part of the appellee. The evidence appears to have been admitted for this purpose alone, and not with any view of laying ⁵⁷⁷ the foundation for an accounting. We are therefore of the opinion that the court below committed no error in not ordering an accounting in the decree entered by it.

No point is made in appellant's original brief that the decree of the court below was not correct in its disposition of the question of taxes and of the question of costs; and, therefore, under rule 15, such point cannot be presented in the reply brief.

The decree of the circuit court is affirmed.

MERGER.—The union of the legal and equitable estate in the same person does not necessarily effect a merger of the equitable estate, where the interest of the parties, or the equitable rights of innocent third persons, require them to be kept distinct: Note to *Speed v. Hann*, 15 Am. Dec. 83. It is a general rule that when the

legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping these titles distinct, or if there be an intervening right between the mortgage and the equity, there is no merger: Note to *Hitchcock v. Harrington*, 5 Am. Dec. 233. For examples of cases where there is no merger, see *Bowling v. Garrett*, 40 Kan. 504, 33 Am. St. Rep. 377; *Horton v. Maffitt*, 14 Minn. 289, 100 Am. Dec. 222. Where a merger does result, see *Dickason v. Williams*, 129 Mass. 182, 37 Am. Rep. 316.

JUDICIAL SALES—IRREGULARITIES—SETTING ASIDE—LACHES.—Courts of equity will grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, provided the application be made therefor in the suit in which the decree is entered within a reasonable time, and the relief sought will not operate to prejudice the just rights of other persons: *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540. A delay of fifteen years is inexcusable laches: Note to *Smith v. Thompson*, 54 Am. Dec. 131.

JUDICIAL SALES.—RIGHTS OF PURCHASERS for value by reason of void sales: Extended note to *Scott v. Dunn*, 30 Am. Dec. 177.

JUDICIAL SALES—IRREGULARITIES—COLLATERAL ATTACK.—A sheriff's sale which is merely irregular cannot be attacked collaterally: *Boos v. Morgan*, 130 Ind. 305, 30 Am. St. Rep. 237. Strangers cannot attack collaterally: *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357.

JUDICIAL SALES—SETTING ASIDE—INADEQUACY OF PRICE.—Sheriff's sales cannot be set aside for mere inadequacy of price: *Stroup v. Raymond*, 183 Pa. St. 279, 63 Am. St. Rep. 758. If the price is so grossly inadequate as to raise an inference of unfairness, the sale should be set aside: *Johnson v. Avery*, 60 Minn. 262, 51 Am. St. Rep. 529.

YOUNG v. STEVENSON.

[180 ILLINOIS, 608.]

BUILDING AND LOAN ASSOCIATIONS—RIGHT TO COMPEL MEMBER TO REFUND WITHDRAWAL.—A member of a building and loan association, who, in compliance with the statute and by-laws of the association, has exercised the right to surrender his shares of stock and has received the amount to which he is entitled therefor, while the association is a going concern, cannot be required by it or its receiver to rescind the transaction and refund the amount so received on the ground that the association was then insolvent and that the distribution was unjust to nonwithdrawing members. If any right of action exists, it is in the members who remain and suffer by such withdrawal.

BUILDING AND LOAN ASSOCIATIONS—RECEIVER OF—WHO REPRESENTS.—The receiver of a building and loan association represents the corporation itself, and not the shareholders, and he succeeds to all rights of action which had accrued to the corporation, but not to the rights of action which rested with the shareholders.

BUILDING AND LOAN ASSOCIATIONS—RIGHT TO COMPEL MEMBER TO REFUND.—Where the withdrawal value of a member's shares is ascertained by the statute and by-laws of a building and loan association, the parties may apply such value to

the payment of the member's note to the association, but this does not vest a right of action in the association to compel the withdrawing member to rescind the transaction, on the ground that the association was then insolvent and the transaction a fraud upon non-withdrawing members.

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL—RIGHT TO COMPEL REPAYMENT.—The fact that the relation of stockholders in a building and loan association is, in many of its aspects, that of copartners, does not invest the association with a right of action to compel repayment of an amount received by a shareholder on withdrawal of his stock.

Action by the receiver of a building and loan association to compel the repayment, by a withdrawing member thereof, of the amount received for his shares. Judgment for the defendant, and the receiver appealed.

Kenick & Bracken, for the appellant.

Rowell, Neville & Lindley and J. E. Pollock, for the appellee.

¶13 **BOGGS, J.** The right of a shareholder to surrender his shares and receive the withdrawal value thereof is a peculiar feature of associations of this character. The statute under which such associations are incorporated secures to the holders of shares of stock therein the right to withdraw such shares under certain specified terms and conditions. It becomes the duty of their boards of directors to adopt by-laws under which the right may be exercised. Withdrawal of stock is but the mode of apportioning to a withdrawing member his share of the assets of the corporation before his stock has reached maturity value, and, if by-laws are so framed that an unequal distribution results, the injury is not to the company as a corporate entity distinct from its shareholders, but to the non-withdrawing members. The belief that the affairs of the association have not been well managed, that investments of capital have been unwisely made and that loss is likely to ensue, or that securities for investment have shrunk in value, or that loss has already resulted, perhaps frequently moves shareholders to withdraw their stock; and even though the facts upon which the belief is based are of such potency in the mind of the withdrawing member as to convert belief into what ¶14 may be deemed knowledge, such shareholder is not thereby deprived of the right of withdrawal when the like right may be availed of by stockholders who are moved to withdraw for the reason they believe their capital may be more profitably invested, or because they have occasion to apply their money to other uses, or for other reasons. The motive which induces the member

to withdraw could not operate to injuriously affect the association. One who, in compliance with the statute and by-law made in pursuance thereof, has exercised the right to surrender his shares of stock and has received the amount he became entitled to receive therefor, may have injuriously affected the right of his fellow-shareholders, but he has not injured the association as an entity distinct from its members. Therefore, he cannot be required by the association to rescind the transaction and refund the amount so received on the ground, alone, the association was then insolvent and the distribution was unjust to nonwithdrawing members. If any right of action exists, it is in the members who remain and who suffer by the withdrawal.

The powers of the appellant receiver are not defined by statute. They are, therefore, such only as are conferred by courts of equity, under their equitable jurisdiction, upon receivers appointed by such courts. As receiver he represents the corporate body, and not its shareholders. He succeeds to all rights of action which had accrued to the corporation, but not to rights of action which rested in the shareholders. If it were still solvent, in full operation, and no receivership had been constituted, the association could not maintain an action against the appellee to recover the sums paid on the stock withdrawals. The right of action, if any, rests in the stockholders of the association—not in the receiver thereof: *Bouton v. Dement*, 123 Ill. 142; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150; *Field on Corporations*, sec. 419; 20 *Am. & Eng. Ency. of Law*, 285, 286; *Butterworth v. O'Brien*, 39 Barb. 192. The fact that the appellee accepted a note due from him to the association in payment of the amount of the withdrawal value of certain of his shares of stock had no effect to vest the right of action in the association. The withdrawal value of the shares having been ascertained, under the provisions of the statute and the by-laws it was entirely within the power of the parties to apply such value to the payment of the note.

Cases cited holding that, after the insolvency of a building and loan association has been judicially declared, a shareholder cannot discharge his indebtedness to the association with its stock, have no application here. The distinction is, that in the case at bar the value of the stock was determined according to the by-laws of the association, and the appellant had the right to demand the amount so determined should be paid him in money, and in the cases cited the associations were insolvent

and the stock had no known or adjustable value, and its holder had not the right to demand any sum from the association in payment for his stock, but was required to await the adjustment of the affairs of the association and accept such sum for his stock as he should be found entitled to upon due administration of the receivership. The fact the relation of stockholders in a building and loan association is in many of its aspects that of copartners has no potency to invest the association with the right of action to compel repayment of an amount received by a shareholder on withdrawal of his stock. The assignee or receiver of the assets of a copartnership has no power to bring suit in equity or an action at law against the partners to recover amounts due from them to the firm: *Lund v. Skanes Enskilda Bank*, 96 Ill. 181.

The judgment of the appellate court is affirmed.

BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL—RIGHT TO COMPEL REPAYMENT.—Where the by-laws permit members to withdraw from a building and loan association upon terms specified therein, and such withdrawal is made in good faith before the association is ascertained to be insolvent, the stockholders thus withdrawing are relieved from all further liability, though it is subsequently ascertained that the corporation is insolvent: Monographic note to *Curtis v. Granite State Provident Assn.*, 61 Am. St. Rep. 30; *Rabbitt v. Wilcoxon*, 103 Iowa, 35, 64 Am. St. Rep. 152; *Eversman v. Schmitt*, 53 Ohio St. 174, 53 Am. St. Rep. 632; monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 155.

FULLENWIDER v. SUPREME COUNCIL OF THE ROYAL LEAGUE.

[180 ILLINOIS, 621.]

BENEVOLENT SOCIETIES—RIGHT TO CHANGE BY-LAWS.—If the contract between a member and a benefit society contains an express provision reserving the right in the society to amend or change its by-laws, and if, in the certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the society and fund, or that may thereafter be enacted for such government, and such conditions are assented to and the member accepts the certificate under such conditions, that is a sufficient reservation of the right in the society to amend or change its by-laws.

BENEVOLENT SOCIETIES—CHANGE IN BY-LAWS—VESTED RIGHTS.—If the contract between a benefit society and a member thereof requires compliance on the part of the latter with any by-laws that may thereafter be enacted and the certificate of membership is accepted with similar stipulations therein, the member has no vested right to have the contract in such certificate remain unchanged, and the society may change it from time to time by reasonable by-laws.

Hamilton & Fullenwider, for the appellant.

J. L. Clark and Knecht & Bullard, for the appellees.

⁶²¹ PHILLIPS, J. This is an appeal from the appellate court for the first district, seeking to review a judgment of that court affirming a decree entered by the circuit court of Cook county. The complainant in the original bill, the appellant here, was a member of the defendant corporation, which was organized under the statute concerning corporations, ⁶²² approved April 18, 1872. He filed his bill in the circuit court of Cook county, in behalf of himself and such other members similarly situated, against the defendants, praying an injunction to prevent the corporation from putting into force certain amendments to by-law No. 6, containing increased rates of assessment, and from suspending from membership or from forfeiting the benefit certificate of complainant or other members failing to pay the increased assessment; also praying a decree adjudging such amendments to by-law No. 6 unreasonable and void and to have the same set aside, and that the defendant corporation be enjoined from thereafter increasing, or attempting to increase, the rates of assessments in force at the time the complainant became a member without his consent, and from collecting any increased assessment from the complainant and others similarly situated without their consent, and for general relief. A hearing was had upon the bill, answer, exhibits attached to the bill and answer, and affidavits, as on a final hearing, and a decree was entered dismissing the bill for want of equity, at the cost of the complainant.

The complainant alleges that he is the holder of a benefit certificate issued to him by the Supreme Council of the Royal League, as a member of Commercial council, being a subordinate council of said Royal League, bearing date January 2, 1895, for the sum of four thousand dollars, for life insurance, in which certificate it is stated, among other things, that it is issued upon evidence received from the subordinate council that he has contributed and is a contributor to the widows' and orphans' benefit fund of the order. The certificate states that upon condition that the statements made in his application for membership, and the representations, agreements, statements, and answers contained in the medical examiner's certificate, are made part of the contract, and upon condition that said member complies in the future with the laws, rules and regulations now governing said council and fund, or that ⁶²³ may hereafter

be enacted by the supreme council to govern said council and fund, all of which are made part of the contract, the Supreme Council of the Royal League promises and binds itself to pay out of the widows' and orphans' benefit fund, to the beneficiary therein named, a sum not exceeding four thousand dollars, upon satisfactory proof of death, in accordance with and under the provisions of the laws governing said fund.

When the certificate was issued, by-law No. 6 in force provided that "every person, before becoming a beneficial member, shall pay to the collector the following rates for the widows' and orphans' benefit fund, and the same amount on each assessment thereafter whilst he is a member of the order." The table of rates following provides for payments of assessments of one dollar and thirty-four cents at twenty-one years of age to three dollars and forty-four cents at forty-five years of age. Within these extremes of age of twenty-one and forty-five years different assessments were provided for, according to age, and the complainant, who was of the age of thirty-nine at the time his certificate was issued, was required to pay an assessment of two dollars and sixty-two cents. By the previous by-laws it was provided that an assessment should be due from each beneficiary member on the first day of each calendar month, and a fine could be imposed if not paid during that month. By other provisions, if no assessment was necessary, members could be notified that none would be called for, but in cases of emergency an assessment might be levied at any time, payable within thirty days after notice. A full rate membership was by the constitution declared to be four thousand dollars, and in the same instrument the object of the society was declared to be to establish a widows' and orphans' benefit fund, out of which the beneficiary in the certificate was to be paid on the death of the member. By section 1 of article 4 of the constitution of the supreme council, and the by-laws thereunder governing the widows' and orphans' benefit fund, it was ordered that the same should not be altered or amended ⁶²⁴ except by a three-fourths vote of the membership of the supreme council, and the amendments thereto should be proposed in writing. At the last annual session of the supreme council of the defendant order, the by-law containing the table of rates was amended and a new table of rates adopted, applicable to all beneficiary members whose certificates were issued prior to July 1, 1897, and to all thereafter admitted, by which the rate of assessment was materially increased, the rate for members of the same age

of complainant, including complainant, being increased from two dollars and sixty-two cents to four dollars and fifty-two cents for each assessment. By this latter by-law ninety-six per cent of the assessments levied was to be for the benefit of the widows' and orphans' fund and the remaining four per cent was to be for the expenses of management. The complainant paid all assessments levied up to the date of the filing of the bill at the rate mentioned in the table of rates contained in the by-law when his certificate was issued.

It is not contended that the change in the by-laws and table of rates made by the supreme council was not in the manner provided by its constitution, nor is it contended that either fraud or improper motives influenced the action of the council, nor that it was not acting in good faith. The position taken by the complainant is, that the certificate issued to him constitutes a contract between himself and the society by which no assessment can exceed two dollars and sixty-two cents; that no change of the by-laws and increase of the rates of assessment could be made by the corporation except as to new members; that the change is retroactive in effect, and is therefore unreasonable and void; that the excess of four per cent collected is in the line of the creation of a reserve fund, and that no power exists to assess for the expenses of the management of the widows' and orphans' benefit fund.

Under the act of 1893, in relation to benevolent societies, which is being conformed to by this defendant, it is provided that "a fraternal beneficiary society is hereby ⁶²⁵ declared to be a corporation or association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit." It is further provided that each such society shall have a lodge system, with ritualistic form of work and representative form of government, and may make provision for the payment of benefits in case of disability and death, or of either, resulting from either disease, accident, or of old age of its members, the payment of such benefit, in all cases, being subject to compliance by the member with the contract, rules, and laws of the society. The contract between a beneficiary member and the corporation is not to be construed on merely a part of any proceeding in connection with or in relation to the issuing of a certificate. In construing the contract by the holder of the certificate—or, rather, that made between the member and the corporation—the application, the examination by the physician, the constitution and by-laws and the certifi-

cate issued are all to be construed together as the contract between the parties. The certificate of membership, in addition to what has been stated herein, provides that the members shall comply in the future with the laws, rules, and regulations now governing the council and fund or those that may hereafter be enacted, which are made a part of the contract. It was further expressly provided in the certificate: "These conditions being expressly assented to and complied with, the Supreme Council of the Royal League hereby promises and binds itself to pay," et cetera. And attached to the certificate was the provision, "I accept this certificate on the conditions named herein," which was signed by the beneficiary member.

The power to enact by-laws for the government of a corporate body is an incident to the existence of a body corporate and is inherent in it. The power to make such changes as may be deemed advisable is a continuous one. Where the contract contains an express provision reserving ⁶²⁶ the right to amend or change by-laws, it cannot be doubted that the society has the right so to do, and where, in a certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the council and fund or that may thereafter be enacted for such government, and those conditions are assented to and the member accepts the certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws: *Dwinger v. Geary*, 113 Ind. 106; *Supreme Lodge v. Knight*, 117 Ind. 489; *Stohr v. San Francisco etc. Soc.*, 82 Cal. 557; *Niblack on Benefit Societies*, 2d ed., secs. 24-28; *Bacon on Benefit Societies*, 2d ed., sec. 185; 1 *Joyce on Insurance*, secs. 188, 189; *Poultney v. Bachman*, 31 Hun, 49; *Fugure v. Mutual Soc.*, 46 Vt. 362; *Supreme Commandery v. Ainsworth*, 71 Ala. 449, 46 Am. Rep. 332.

It is apparent that the new by-law was adopted in the manner provided for in the laws of the society and was not an unreasonable enactment. It was enacted under a right to amend the by-laws reserved expressly in the contract, and hence it cannot be claimed it in any manner impaired any vested right. The contract requiring compliance with any by-laws that might be thereafter enacted, and the certificate being accepted with such a clause therein, there is no vested right of having the contract in the certificate remain unchanged, because the recognition of the power to make new by-laws is necessarily a recognition of the right to repeal or amend those theretofore made.

Whilst courts strongly disfavor any alteration or change in an insurance contract without the assent of the insured, yet where the contract does reserve to the corporation the right, from time to time, to amend its rules or by-laws and binds the assured to compliance with such rules or by-laws, and such provision is expressly assented to in writing by the assured, it cannot be said that it would be an extraordinary power to make such change, and such a contract would not meet ⁶²⁷ with disfavor from the courts: *Becker v. Farmers' Mut. Ins. Co.*, 48 Mich. 610; *Hobbs v. Iowa Mut. Ben. Assn.*, 82 Iowa, 107, 31 Am. St. Rep. 466; *Supreme Commandery v. Ainsworth*, 71 Ala. 449, 46 Am. Rep. 332.

We are of opinion there was power in the society to change the by-laws as provided, and that the defendant accepted his certificate with full knowledge of the reservation of such power in the society and assented thereto.

The judgment of the appellate court affirming the decree of the circuit court is affirmed.

Cartwright, C. J., and Boggs and Wilkin, JJ., dissenting.

BENEVOLENT SOCIETIES—RIGHT TO CHANGE BY-LAWS—VESTED RIGHTS.—Parties are bound by their contract, and a member of a benefit society frequently accepts a benefit certificate subject to the right of the association to amend its constitution and by-laws. In such cases, the contract, so far as it consists of the constitution and by-laws, may be changed by an amendment of the constitution and by-laws, but in so far as it consists of something specifically agreed to between the parties at the time, and not necessarily a part of the constitution and by-laws, an amendment changing the contract is invalid. A contract between a member and the association cannot be enlarged or changed except by the consent of both contracting parties; but if the association expressly reserves the right to amend, and the member makes himself subject to whatever change the association may make in the contract, he is bound by the rules "now in force or which may hereafter be enacted," and must take notice of the existence and effect of such reserved power: Monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557; *Pain v. Societe St. Jean Baptiste*, 172 Mass. 319, 70 Am. St. Rep. 287, and note; *Supreme Lodge K. of P. v. Kutscher*, 179 Ill. 340, 70 Am. St. Rep. 115.

NATIONAL HOME BUILDING AND LOAN ASSOCIATION v. HOME SAVINGS BANK.

[181 ILLINOIS, 85.]

CORPORATIONS — POWERS — SCOPE OF.—A corporation has no natural rights or capacities such as an individual or a partnership, and, if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter of the corporation.

BUILDING AND LOAN ASSOCIATIONS—POWERS—PURCHASE OF REALTY.—A building and loan association having power by its charter to raise funds to be loaned to its members, and to purchase realty upon which it holds an encumbrance, and freely deal with and dispose of the same, has no power to invest its money in real estate upon which it holds no lien and in which it has no interest.

CORPORATIONS — CONTRACTS ULTRA VIRES OF — WHEN MAY BIND.—Where an act or contract is ultra vires, not for want of power in the corporation, but for want of power in the agent or officer consummating it, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may become binding upon the corporation by ratification, consent, or acquiescence, or by the corporation receiving benefits under the act or contract.

CORPORATIONS—DUTY OF PERSONS DEALING WITH. A person dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their scope, and cannot plead ignorance in avoidance of the defense of ultra vires.

CORPORATIONS — CONTRACTS ULTRA VIRES OF — WHEN CANNOT BECOME BINDING.—Where a contract is ultra vires in the proper sense, being of a sort into which the corporation absolutely lacks the power to enter, it cannot be ratified or become valid by acquiescence; nor can the corporation be bound by such contract upon the ground of estoppel arising from the receipt of benefits. Such a contract is void, and no action can be sustained upon it.

Cutting, Castle & Williams and Wagner, Bingham & Long, for the appellant.

Winston & Meagher, A. L. Whitehall, and R. M. Shaw, for the appellees.

39 **CARTWRIGHT, C. J.** In November, 1893, Flora D. Bishopp made a trade of lots in the city of Chicago with the National Home Building and Loan Association, appellant, in pursuance of which appellant conveyed to her lot 10 in Lee Brothers' addition to Englewood, lots 15 and 16 in block 60 in Chicago University subdivision, and lot 36 in block 2 in Her-ring's subdivision. In exchange for these lots said Flora D. Bishopp and Jonathan D. Bishopp, her husband, conveyed to the building and loan association lots 5 and 6 in block 2 in

Johnson & Clement's subdivision, and in the deed of the same it was agreed that the building and loan association should assume and pay an encumbrance on said lot 5 in the form of a trust deed executed by said Flora D. Bishopp and husband to Charles T. Page, trustee, to secure a note for three thousand dollars and interest. The trade was negotiated and carried out on the part of the association through J. O. Duncan, agent, who was employed by the association to negotiate loans and examine abstracts for it in Chicago, and he acted under the direction of the secretary of the association. After the exchange the association paid a mortgage of six hundred dollars on said lot 5 and the delinquent interest on the mortgage assumed in the conveyance. On May 14, 1895, the board of directors passed a resolution that the assumption clause in the deed was made without authority of the association, and directed the execution and tender of a quitclaim deed of the lot to Flora D. Bishopp. The deed was made and tendered unconditionally, and the association thereby offered the lot to her without a return of the consideration or any other condition. The note for three thousand dollars, secured by the trust deed, was transferred to the Home Savings Bank, one of the appellees, and it filed its bill in the superior court of Cook county to foreclose the same, asking for a decree against Flora D. Bishopp, a sale of the mortgaged premises, and a decree against the building and loan association ⁴⁰ for such deficiency as might exist. The building and loan association answered that the trade was consummated by direction of its president and secretary, but the clause assuming the mortgage was inserted without their knowledge or authority, and without the knowledge and authority of its board of directors, that such an agreement was ultra vires the corporation, and that it had tendered a quitclaim deed of the lot to the said Flora D. Bishopp. The bill was answered by Flora D. Bishopp and her husband, who admitted its material allegations and filed their cross-bill, alleging the agreement for an exchange of the properties and the conveyances, and asking for a deficiency decree against the association. The building and loan association answered the cross-bill, setting up the same defense as before, and the cause was referred to a master, who reported in favor of a foreclosure and sale and a decree against the building and loan association for any deficiency in the payment of the debt, interest, fees, and costs. Exceptions to the report were overruled, and a decree was entered in accordance with it, which has been affirmed by the appellate court.

No objection is made to the foreclosure of the trust deed or the sale of the premises, and the only question involved in this appeal is, whether the contract inserted in the deed, by which the defendant, the National Home Building and Loan Association, agreed to assume and pay the debt, is binding upon it.

This defendant, which denied the binding force of the agreement, is a corporation organized under the provisions of an act entitled, "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879: Laws 1879, p. 83. As a corporation it is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership, and, if a power is claimed for it, the words ⁴¹ giving the power or from which it is necessarily implied must be found in the charter or it does not exist. The law on this subject is stated by the supreme court of the United States in *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." The purpose of this corporation is the raising of funds to be loaned to its members upon the security of its stock and unencumbered real estate. Manifestly, the business of trading in real estate or acquiring the same, except as incidental to their legitimate business, is wholly foreign to the purpose for which the state has created such corporations and conferred upon them corporate powers. They have no power to take and hold real estate, and contracts made for the purchase of it are not enforceable: *Endlich on Building Associations*, secs. 305-308. But for the purpose of collecting debts it is essential that they should have some power with respect to the real estate mortgaged to them, and for that purpose section 13 of the act for their incorporation provides as follows: "Any loan or building association incorporated by or under this act is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, lien, or other encumbrance, or in which said association may have an interest, and the real estate so purchased, to sell, convey, lease, or mortgage at pleasure to any person or persons whatsoever." Such corporations are not authorized, either by their charters or as an incident to

their existence, to acquire or hold any real estate, except such as has been mortgaged to them or which they may have an interest in. Not only is this the rule to be derived from the act of the legislature authorizing their incorporation, under the general principles of law, but it ⁴² is, and always has been, against the policy of the state to permit corporations to accumulate landed estates, or to own real estate beyond what is necessary for their corporate business or such as is acquired in the collection of debts: *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 236; *People v. Pullman Palace Car Co.*, 175 Ill. 125; *First M. E. Church of Chicago v. Dixon*, 178 Ill. 260. It is also a settled principle of American jurisprudence: 5 *Thompson on Corporations*, sec. 5772. If a building and loan association were permitted to invest its money in the purchase of real estate, or to traffic or trade in such property, instead of keeping within the powers conferred upon it by loaning such money and collecting it, it would not only be exercising powers not granted, but it would be carrying on a business inconsistent with the purpose of its creation and against the fixed and uniform policy of the state. In *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 292, 17 Am. St. Rep. 319, it was said: "The word 'unlawful,' as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do—or, in other words, such acts, powers, and contracts as are *ultra vires*." In *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, the result of the decisions as to the exercise of powers not granted is summed up, as follows: "All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts; and this upon three distinct grounds—the obligation of everyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

⁴³ It is first contended, in support of the decree, that the contract by which the corporation assumed and agreed to pay the mortgage on lot 5 as a part of the consideration was within its powers. The ground of this claim is, that the corporation

had a mortgage on lot 6 (the other lot which was conveyed to it), and the acquisition of that lot was a legitimate exercise of power. We do not see how the fact that it had power to purchase one lot would operate to give it power to purchase another. The right to acquire property in which it had an interest could not be extended to other property in which it had no interest. If it could make a loan on a lot and buy other property in the vicinity or adjoining it by merely including in the deed the mortgaged lot, the law would be evaded and the policy of the state subverted. The law has given such a corporation power to purchase such real estate as it has a mortgage on for its necessary protection in making collections, but that does not authorize it, by including such real estate, to buy another lot or a subdivision or part of a town, and enter into the business of trading in real estate. If it could not purchase lot 6, upon which it held a mortgage, without buying other real estate, it was not authorized to buy it at all.

It is also argued that the building and loan association is estopped to raise the question whether the contract was ultra vires because it has received the benefit of the contract by the conveyance of property to it. That depends, as we think, upon the sense in which the term "ultra vires" is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but ⁴⁴ which are within the powers of the corporation. In such a case, the act may become binding by ratification, consent, and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. Where an act is not ultra vires for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to

acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.

The powers delegated by the state to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense: *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9; *New Orleans etc. S. S. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173, 26 Am. Rep. 90. Concerning this subject it is said in *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71: "To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law the stronger the claim to its enforcement in the courts." We quote again from *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, as follows: "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is ultra vires in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it,

may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such prerequisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws": See, also, Reese on Ultra Vires, secs. 46-72, for a full discussion of the subject. In *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, the same rules were laid down, and it was pointed out that the cases where a corporation is estopped from ⁴⁶ asserting that a contract is ultra vires when it has received a benefit under the contract is where the making of the contract is within the scope of the franchise, and the contract is sought to be avoided because there was a failure to comply with some regulation or the power was improperly exercised. The following was there quoted from the opinion in *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 41 Am. Rep. 221: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland etc. R. R. Co.*, 23 How. 381, 398, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Ry. Carriage etc. Co. v. Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power or the failure to comply with prescribed formalities or regulations in a particular instance, when such abuse or failure is not known to the other contracting parties."

The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers. *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336, was a case where the corporation was expressly authorized to borrow money and to mortgage its road. Money was borrowed and received by the corporation, and a bond and mortgage were executed. The corporation sought to question the official character of the persons who borrowed the money and executed the mortgage as directors of the company. It was held that the corporation could not dispute their official relation after receiving the money.

In *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, the North

Star Gold and Silver Mining Company had given its notes for borrowed money. The court said: "The borrowing of the money was not, in itself, an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be ⁴⁷ used for an illegal or immoral purpose. The lenders have been guilty of no violation of law nor wrong of any kind." The bill was filed in the case by one of the stockholders to enjoin the payment of the notes, because the money was appropriated to mining in the territory of Colorado. It was not decided whether engaging in mining in Colorado was *ultra vires* or not, but the doctrine of *ultra vires* has never been carried to the extent of requiring one who honestly lends money to a corporation authorized to borrow it to see that it is not applied to an improper purpose. The transaction was perfectly lawful and not *ultra vires* the corporation, and the rights of the lender were maintained, with some natural and proper remarks about honesty as applied to corporations.

In *Darst v. Gale*, 83 Ill. 136, an insurance company borrowed money which it had a right to borrow to carry on its business, and mortgaged real estate to secure its payment. A purchaser of the real estate subsequent to the trust deed, and therefore subject to it, tried to avoid the encumbrance on the ground that the company had no right to execute the mortgage. The court said: "That in certain cases it might have lawfully done so, even against the remonstrance of those who had the right to directly interfere in its management, we think can admit of but little controversy." It was deemed unimportant whether it was in fact necessary to make the mortgage, because, conceding that the evidence did not show such a necessity, the defense could not be availed of by the corporation, or by the purchaser, who bought with full knowledge of the trust deed. The case belongs to a class already explained. The corporation had the right to do the very thing complained of, and neither it nor the purchaser could set up that the requisite conditions for the exercise of the power did not exist.

In *Kadish v. Garden City Equitable etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256, the court purposely avoided deciding whether corporations for manufacturing purposes could become ⁴⁸ members of homestead and loan associations, and whether such an association could loan money for general business purposes. The corporation had a right to loan money and the loans were made to actual members. All that was insisted upon was, that the borrowers, though in fact members, were ineligible

to membership, and the money was applied to general business purposes. It was held that the eligibility to membership could not be questioned nor the purpose for which the money was borrowed, and the term "ultra vires," as there used and defined, did not embrace unlawful acts which the corporation could not perform as being different from the purpose of its organization and against the policy of the state.

In this case, the transaction was beyond the corporate powers and ultra vires in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence, since there was no power to make it. Flora D. Bishopp, who dealt with the corporation, was chargeable with notice of its powers and their limitations and its inability to enter into the contract. She could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.

The decree of the superior court against the National Home Building and Loan Association for any deficiency that may exist, and for execution to collect the same, and the judgment of the appellate court affirming said decree in that respect, are each reversed.

MR. JUSTICE CARTER, briefly dissenting from the foregoing opinion, expressed his inability to accept the doctrine that a corporation may not be estopped from pleading its lack of corporate power, and considered it to have long been the doctrine of his court that a corporation, by receiving benefits under a contract neither *malum in se* nor *malum prohibitum*, will be estopped to plead, in avoidance of payment, its lack of power to enter into the contract. He denied that the doctrine of estoppel in this connection rests upon the principle of agency, and affirmed that there may be a ratification of the unauthorized acts of agents, and said that in many cases it has been held that "the question of ultra vires can only be raised in a direct proceeding by the state to oust the corporation of its assumed and usurped powers": Citing *Bradley v. Ballard*, 55 Ill. 418, 8 Am. Rep. 656; *Kadish v. Garden City Bldg. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Eckman v. Chicago etc. R. R. Co.*, 169 Ill. 312; *Darat v. Gale*, 83 Ill. 136.

CORPORATIONS — POWERS. — A corporation possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence: *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334. Natural persons may do with themselves and their property whatever is not forbidden, but artificial persons cannot rightfully do any-

thing that is not expressly or by necessary implication permitted by the law of their being: Pittsburgh etc. Ry. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517.

BUILDING AND LOAN ASSOCIATIONS—PURCHASE OF REALTY.—Building and loan associations may acquire real estate, through mortgages given to secure loans which it is their object to make. They cannot, generally, acquire and hold real property otherwise, unless by charter or statute they are given express power: Monographic note to Robertson v. Homestead Assn., 69 Am. Dec. 158.

CORPORATIONS—POWERS—DUTY OF THIRD PERSONS.—Strangers or third persons are presumed to know the law of the land, and are bound, when dealing with corporations, to know the powers conferred by their charters: Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334; monographic note to In re Assignment Mutual etc. Ins. Co., 70 Am. St. Rep. 176.

CORPORATIONS—CONTRACTS ULTRA VIRES.—The term "ultra vires" is applicable to contracts of corporations only when they involve adventures or undertakings outside and not within the scope of the power given by their charters: Monographic note to In re Assignment Mut. etc. Ins. Co., 70 Am. St. Rep. 158, where the doctrine of ultra vires in relation to the contracts of private corporations is fully discussed.

GIBSON v. NELSON.

[181 ILLINOIS, 122.]

WILLS—ATTESTATION—ORDER OF SIGNING BY TESTATOR AND WITNESSES.—Where a will appears on its face to have been properly executed and witnessed. It is not rendered invalid by proof that the testator signed it after the witnesses had signed, it being shown that the several acts of signing were contemporaneous and parts of the same transaction.

George G. Bellows, for the appellant.

M. C. Harper and O. C. Peterson, for the appellees.

123 CARTER, J. Upon their bill brought to contest the last will, and the probate thereof, of Leander E. Nelson, deceased, the appellees obtained a decree, based upon a verdict of the jury, that the will had not been signed by the testator when the attesting witnesses signed their names as witnesses to the instrument, and that it was not the last will of the deceased, and it was accordingly set aside. The record is now before us on the appeal of James W. Gibson, the principal legatee and devisee.

While there was some controversy of fact, yet we think the effect of the testimony of the subscribing witnesses was that they subscribed their names as witnesses to the instrument, as the last will of the testator, at his request and in his presence, but that he did not sign the will until after the signatures of the witnesses had been affixed; that the witnesses and the testa-

tor were all present at the time; that it was on the same occasion and was one ¹²⁴ transaction, completed when all were present, but that in the mere order of signing the witnesses preceded the testator. On behalf of the contestants the court gave to the jury the following instruction: "The jury are instructed that, in order that a will be properly attested and be a valid will, it is necessary that the attesting witnesses subscribe their names to the same as witnesses in the presence of the testator and at his request, and that the name of the testator be signed to the instrument before the signatures of the attesting witnesses are attached; and you are instructed that, if you find from the evidence that the signature of Leander E. Nelson was not attached to said instrument so offered here as his will until after the names of the attesting witnesses were attached thereto, then said instrument is not the last will and testament of said Nelson, and it is your duty so to find."

The question is thus presented for decision whether, under our statute of wills, an instrument intended as a will, appearing to have been executed and witnessed with all the formalities required by the statute, must fail to take effect as a will merely because the act of the testator in signing the will followed that of the witnesses, though done in their presence on the same occasion and as a part of one entire transaction. Section 2 of the act in regard to wills, so far as it affects this question, provides: "All wills . . . by which any lands, . . . goods, and chattels are devised shall be reduced to writing and signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will . . . in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix ¹²⁵ to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will . . . to admit the same to record; . . . and every will, . . . when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded, . . . and shall be good and available in law," et cetera.

It will be noticed that the statute does not in terms require the subscribing witnesses to attest or certify that the will was signed by the testator before they subscribed their own names, and in *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151,

we held that where the testator acknowledged the will to be his act and deed, that was sufficient without acknowledging specifically and in terms that he had signed it; that as it would not be a will without his signature, it would, in the absence of proof, be presumed from his statement that it was his will, and that he had signed it. In that case it was pointed out that decisions based upon the English statute, and the statutes of New York and other states, requiring specifically that the signature be made or acknowledged in the presence of the witnesses, were not applicable here, where the statute requires that the testator acknowledged merely the will. It cannot, of course, be presumed in the case at bar that at the precise moment when the witnesses subscribed their names to the instrument the testator had signed it, for they testified to the contrary on the trial below; but he signed it in their presence, as required by the statute, and the several acts of signing by the testator and witnesses took place on the same occasion and constituted one transaction, viz., the execution and attestation of the will. Must the instrument be held inoperative as a will merely because the testator and the witnesses did not observe the usual order, in point of time, in signing their names? To so hold would, in our opinion, require a greater degree of nicety in the execution of wills than is required by the statute. Suppose the draftsman of a will has read it ¹²⁶ over to the testator, and the testator, having approved it, requests him to subscribe his name as a witness, and he does so at the time and in the presence of the testator, and then hands the pen to the testator, who thereupon signs the will, is there any provision of the statute or rule of law which would require the courts to take notice of the difference in the moment of time intervening between the two acts of signing, where both were parts of one transaction? We know of none. It would not be physically impossible for the testator and the witnesses to sign at the same time, yet, under the rule contended for and as held by the court below, the will would be invalid because the testator did not sign first. Undoubtedly, the proper order is for the testator to sign first, for after the witnesses had signed he might never sign, or might sign on some other occasion or out of their presence, which would not be a compliance with the statute; but we are not prepared to hold that the validity of the instrument as a will can be made to turn upon the mere order in which the signatures are attached to the instrument, where all are attached at the same time.

We are referred to cases, both English and American, which

have so decided, but we do not regard the reasoning employed satisfactory when applied to a case arising under our statute. In *Chase v. Kittredge*, 11 Allen, 63, 87 Am. Dec. 687, while it was said that a will was not sufficiently witnessed where the witnesses signed their names before the testator signed, still the fact was, in that case, that one of the witnesses had not only signed his name before the testator had, but had signed it out of the presence of the testator. Still, it has undoubtedly been held in many cases that a will signed by the attesting witnesses before it was executed by the testator, though on the same occasion, is not entitled to probate. We are of the opinion, however, that as applicable to cases arising under our statute, cases holding to the opposite view are sustained by the better reasoning. In *O'Brien v. Gallagher*, 25 Conn. 127 229, the court said: "Where, as in the present case, witnesses are called to attest the will, and, being informed what the instrument is, subscribe their names thereto as witnesses, and the testator on his part and in their presence duly executes the instrument as his will, and all is done at one and the same time and for the purpose of perfecting the instrument as a will, we cannot say that it is not legally executed merely because the names of the witnesses were subscribed before that of the testator." So, also, in *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97, it was held that "the mere fact whether, in the order of time, the testatrix made her mark before or after the subscription of the witnesses, is, under the circumstance, in nowise material, inasmuch as the whole transaction must be regarded as one continuous, uninterrupted act, conducted and completed within a few minutes, while all concerned in it were present, and during the unbroken supervising attention of the subscribing witnesses." So, too, in *Miller v. McNeil*, 35 Pa. 217, 78 Am. Dec. 333, the court said: "Our statute contemplates, undoubtedly, a signature by the testator and then a signing by witnesses in attestation of the signature; . . . but when a transaction consists of several parts, all of which occur at the same moment and in the same presence, are we required to undo it because it did not occur in the orderly succession which the law contemplates? No language of our statute of wills imposes any such necessity upon us, and we would not decide anything so unreasonable except under stress of very positive statutory language. The execution and attestation of the will were contemporaneous, or, rather, simultaneous, acts, and we will not regard the question who held the pen first—the testator or his witnesses." In 1

Redfield on Wills, *226, it is said: "The particular order of the several requisites to the valid execution of a testament is not at all material, provided that they be done at the same time and as a part of the same transaction."

¹²⁸ These authorities, and others following them, hold, in our opinion, the more reasonable rule. To invalidate such a will, otherwise properly executed and attested, would enable a witness, after the lapse of many years, to defeat its operation by proof of an unimportant fact which few could then remember. How many witnesses to wills, unaided by presumptions and inferences which arise from the ordinary course of procedure in the execution of wills, could remember as a fact that the testator signed the will first? While it is true, as contended, that the instrument is not a will until it has been executed by the testator, and cannot be attested as a will by the witnesses without such execution, it is also true that it is not a complete will until it has been attested by the necessary witnesses, the statute requiring both. While this attestation required by our statute includes the subscription of their names by the subscribing witnesses, it means much more—that is, that they bear witness and certify to the facts required by the statute to make a valid will: *Swift v. Wiley*, 1 B. Mon. 114. The mere physical act of signing their names does not constitute the whole, nor the most important part, of the duty of attesting witnesses. If all of the several acts required by the statute are done upon the same occasion, in the presence of the testator and the attesting witnesses, and, as said in the case cited above, under their unbroken supervising attention and as parts of one entire transaction, we cannot hold that the instrument is rendered inoperative as a will by merely proving the fact that the signatures of the witnesses were affixed before the signature of the testator. In the case at bar, this fact did not appear by the testimony of the subscribing witnesses given in the probate court when the will was admitted to probate, but they testified to it on the hearing of the issue in this case in the circuit court. The will upon its face appeared to have been properly executed and witnessed, and the mere fact, which appeared by the evidence, that the testator ¹²⁹ signed it after the witnesses had signed was rendered harmless by the further fact shown by the evidence that these several acts of signing were done at the same time and as parts of the same transaction.

The court erred in giving the instruction in question. The judgment will be reversed and the cause remanded.

WILLS—ATTESTATION—ORDER OF SIGNING.—The order of signing a will by the testator and the witnesses is not material, if substantially contemporaneous. Hence, the fact that one of the witnesses signed before the testator does not invalidate the will, if all signed at the same interview, each immediately succeeding the other: *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, and note.

WYMAN v. FORT DEARBORN NATIONAL BANK.

[181 ILLINOIS, 279.]

ASSIGNMENT OF DEPOSIT, CHECKS AS.—A check operates as an absolute assignment pro tanto of the fund upon which it is drawn from the time it is delivered, as between the drawer and the payee, but the bank is not bound until the check is presented.

BANKS AND BANKING—APPLICATION OF DEPOSIT UPON DEPOSITOR'S OBLIGATION.—A bank may in good faith charge against the deposit of a correspondent bank a certificate of deposit issued by the latter and coming into the former's hands, and such transaction effects an absolute assignment pro tanto of the deposit, good as against the holder of a check drawn upon such deposit and delivered to the payee before, but not presented to the drawee until after, the consummation of the assignment to the drawee, no prior notice of the check having been given to the drawee.

DEBTOR AND CREDITOR—MARSHALING SECURITIES—SUBROGATION.—Where a prior encumbrancer of two funds, by his election of remedies, deprives a junior encumbrancer, who has a lien upon one of the funds only, from reaching that particular fund, the junior encumbrancer, to the extent of his lien, should be substituted to the lien of the paramount encumbrancer upon the other fund, as against the debtor and all claiming under him by lien or title subsequent in time.

BANKS AND BANKING—APPLICATION OF DEPOSIT UPON OBLIGATION OF DEPOSITOR—RIGHTS OF CHECK-HOLDER—SUBROGATION.—Where the payee of a check drawn by one bank upon another is deprived of his rights under the resulting equitable assignment of the deposit by the act of the drawee bank, before notice or presentment of the check, in applying the deposit of the drawer to the satisfaction of an obligation of the drawer held by the drawee, the payee is entitled to be subrogated to the rights of the latter in collateral securities held by it as security for the obligations of the drawer, in so far as such securities are unnecessary to the proper reimbursement of the drawee. This right of subrogation is enforceable as against the drawer and those claiming under it by title or lien subsequent to the delivery of the check.

Peckham, Brown & Packard, for the appellant.

Gilbert & Fell, for the appellees.

²⁸² **PHILLIPS, J.** It is insisted by the appellant that by the execution and delivery of its check for ten thousand dollars against the deposit account of the Fort Dearborn National Bank the First National Bank of Helena assigned and transferred to the appellant, from that deposit account, an amount

sufficient to pay the check on September 1, 1896, the time at which it was drawn, and as sustaining this contention appellant cites *National Bank v. Indiana Banking Co.*, 114 Ill. 483; *Abt v. American Trust etc. Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, and *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270.

²⁸³ The principle is clearly established by the foregoing and other authorities in this state, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, and the banker becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time the same is presented: *Munn v. Burch*, 25 Ill. 35. The check operates as an absolute assignment of the fund on which it is drawn, from the time it is delivered, as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such presentation is absolutely assigned to the holder of the check: *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403; *Niblack v. Park Nat. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203. And the relation existing between the drawer, the checkholder, and the banker becomes such, when there are sufficient funds on deposit to meet the check at the time of presentation, that because such funds were appropriated at the time of the drawing of the check, the contract to be implied between the depositor, the banker, and the checkholder is, that the checkholder, whoever he may be, may have his action and recover against the bank the amount, pro tanto, of the check: *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 536, 63 Am. St. Rep. 270. In the latter case it was said: "If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the checkholder until presentment,²⁸⁴ and that priority in drawing a check does not give priority of right to the fund as

against the banker, but that such priority of right is determined by the order of presentation." It was held in *Niblack v. Park Nat. Bank*, 169 Ill. 521, 61 Am. St. Rep. 203: "It is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account, and if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterward presented."

In this case, on the 4th of September—at least one day before the presentment of the check for payment—the Chicago bank transferred the account, and by proper entries on its books credited the Helena bank with all the money held by it to the credit of the latter bank, which credit was made on a certificate of deposit, which was, in effect, a demand note: *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610. Appropriating the deposit fund in good faith, in pursuance of strict legal rights, for the purpose of protecting its own interests, and without notice of the appropriation of the money by drawing the check in favor of appellant, was not a wrongful act, but one authorized by law, and absolutely transferred the legal and equitable right to the fund so deposited to the Fort Dearborn National Bank, the check not having been presented to it nor it having any notice of the same until the day after the transfer of the account. Under the recognized rule in this state, there was between the Helena bank and the payee of the check an absolute assignment of ten thousand dollars then on deposit with the Fort Dearborn National Bank, and no right existed in the Helena bank to change that deposit in any way or to so draw against it as to prevent the assignment, pro tanto, from being carried out. It is clear the holder of the check had an interest in the fund so assigned, whilst it is equally clear that until the bank had notice it could pay subsequently drawn checks, or credit the amount of the deposit on any overdue ²⁸⁵ paper of its own. The equitable interest of the checkholder, however, remained the same.

It is a principle controlling the marshaling of securities that, where one creditor can resort to two funds and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. In *Pomeroy on Equitable Jurisprudence*, section 1414, it is said: "If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions

that in their application the paramount encumbrancer shall not be delayed or inconvenienced in the collection of his debt, . . . that the rights of third parties shall not be prejudiced, and that the parties themselves are creditors of the same debtor." Numerous authorities are there cited as sustaining these propositions.

The principle of marshaling securities has been frequently applied to cases where there is an equitable interest or lien on collateral securities. In *Colebrooke on Collateral Securities*, section 98, it is said: "By this rule, a creditor having a lien upon two funds for the payment of his debt, and a subsequent creditor a lien upon one only of such funds, the former is required to exhaust his remedy against the fund which is especially for his security before resorting to that in which the subsequent creditor is interested. The rule, however, is never enforced in cases where it would cause an injury or damage to the creditor holding such liens upon separate funds or would work injustice to other parties. The rule was applied where a merchant had forwarded his note to a broker for sale, and the proceeds, less commissions, remitted. The broker fraudulently pledged the note, with other collaterals, to a bank to secure a loan to himself, of which the merchant received nothing. The merchant, learning of the misappropriation, gave notice to the bank and claimed to be subrogated to any surplus arising from ²⁸⁶ other securities held by it after the payment of the loan. Subsequently, and before the maturity of the loan, the note fell due and was paid without suit. Upon realizing the other securities, the bank held a surplus in its hands. The merchant was entitled to be paid from such surplus, his voluntary payment not affecting his right of recovery."

This principle is sustained by *Farwell v. Importers' Nat. Bank*, 90 N. Y. 483. In that case, the merchant had an equitable interest in collaterals, which, with his note, were put up to secure the loan to the broker by reason of the broker's misappropriation of the note, and is not equitably a stronger case for the marshaling of assets than where, as in this case, the bank had as security for its certificate of deposit and for its account due, notes aggregating about thirty thousand dollars and a deposit of over twenty thousand dollars. Here, ten thousand dollars of the amount deposited having been equitably assigned to the complainant, by reason of its appropriation by the bank before receiving notice of the drawing of the check, the complainant was deprived of all interest in the deposit, and

the Helena bank, or its receiver, who could have no greater interest than the bank itself, received the benefit of the application of the deposit by the Fort Dearborn National Bank on its certificate of deposit, and the complainant, as holder of the check, had such an interest in the sum deposited that he should be subrogated, as against the Helena bank or its receiver, to the notes held by the Fort Dearborn National Bank after the payment of the residue due the latter bank; and this principle of subrogation is applicable because, by reason of the appropriation of the fund by the bank with which the deposit was made to the payment of a debt for which it held two distinct character of securities, one of those securities is, to an extent sufficient to pay the complainant, released from liability so far as the Fort Dearborn National Bank was concerned, and the latter bank had lawfully used ten thousand dollars of a deposit theretofore ²⁸⁷ assigned to the complainant by the Helena bank: 2 Beach on Modern Equity Jurisprudence, sec. 784; 1 Story's Equity Jurisprudence, secs. 635, 636.

It is a maxim of equity that "equity regards and treats that as done which in good conscience ought to be done," and in writing of this maxim Mr. Pomeroy, in his work on Equity Jurisprudence, section 365, says: "The principle involves the notion of an equitable obligation existing from some cause; of a present relation of equitable right and duty subsisting between two parties; a right held by one party, from whatever cause arising, that the other should do some act, and the corresponding duty—the ought—resting upon the latter to do such act. Equity does not regard and treat as done what might be done or what could be done, but only what ought to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved." A court of equity acting upon this fundamental principle may go beneath the appearance of things and deal with the real facts, where the interest is a purely equitable one, recognized by courts of equity alone. When, therefore, a prior encumbrancer of two funds, by his election of remedies, deprives a junior encumbrancer, who has a lien upon one of the funds only, from reaching the particular fund on which he has a lien, the junior encumbrancer, to the extent of his lien, should be substituted to the lien of the paramount encumbrancer upon the other fund bound, as against the debtor and

all claiming under him by lien or title subsequent in time: *Gibson v. Seagrim*, 20 Beav. 614; *James v. Hubbard*, 1 Paige, 228; *Clowes v. Dickinson*, 5 Johns. Ch. 235. Under a bill for marshaling securities, relief may be had in that character of case. The Fort Dearborn National Bank had a right to apply the deposit in payment of the indebtedness pro tanto to the extent of ~~228~~ the deposit, and deprive the checkholder of any part of that deposit as a fund assigned to him, but he had such an equitable interest in that fund by reason of its assignment by the check that he is entitled to be subrogated, to the extent of his check, with interest thereon from the time it was presented, to the fund to be derived from the collection or sale of the collateral securities held by the Fort Dearborn National Bank as security on its certificate of deposit and bank account, after the residue is paid to it.

The superior court erred in decreeing that the Fort Dearborn National Bank should deliver to the receiver of the First National Bank of Helena the collateral notes, but did not err in decreeing that from the proceeds of the same there should first be paid to the Fort Dearborn National Bank the amount, including interest, due it, and to pay to Wyman the amount due on said check and interest, and to retain the balance as part of the assets of the First National Bank of Helena; nor was there error in the decree of the superior court in directing if there was not enough to pay Wyman in full, the amount unpaid should be allowed as a claim against said First National Bank of Helena, to be paid in due course of administration of its assets, and that the receiver pay the costs. It was error in the appellate court for the first district to reverse the entire decree of the superior court and remand the cause, with directions to dismiss the bill.

So far as the superior court decreed that the Fort Dearborn National Bank deliver to the receiver of the First National Bank of Helena the collateral notes, its decree is reversed, but in all other respects the decree of said court is affirmed. For the error of the appellate court for the first district in reversing the entire case and remanding with directions to dismiss the bill, its decree is reversed and the cause is remanded.

BANKS—ASSIGNMENT OF DEPOSIT—CHECKS AS.—The authorities are divided upon the question whether the drawing and delivery of a check upon a fund in a bank are in effect an assignment to the holder of the check of so much of the fund as the check calls for. As holding that the check operates as an assignment, see *Ni-black v. Park Nat. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203; *Whitehouse*

v. Whitehouse, 90 Me. 468, 60 Am. St. Rep. 278; Abt v. American etc. Bank, 159 Ill. 467, 50 Am. St. Rep. 175. Contra, Cincinnati etc. R. R. Co. v. Bank, 54 Ohio St. 60, 56 Am. St. Rep. 700, and note. See the extended note to Hemphill v. Yerkes, 19 Am. St. Rep. 609, collecting the cases on both sides of the question.

BANKS—APPLICATION OF DEPOSIT UPON DEPOSITOR'S OBLIGATION.—If a bank holds a demand note, or a note past due, it has a right to charge it up against the maker's deposit account, and, if it does so before a check drawn by the depositor is presented for payment, it is entitled to hold the deposit as against a check afterward presented: Niblack v. Park Nat. Bank, 169 Ill. 517, 61 Am. St. Rep. 203.

DEBTOR AND CREDITOR—MARSHALING ASSETS—SUBROGATION.—A creditor who has two funds open to him, while another creditor has but one, cannot take the latter fund without placing that one exclusively within his reach at the disposal of the creditor whom he has deprived of the means of payment. If he refuses or neglects to fulfill this duty, equity will decree subrogation: Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22.

PEOPLE v. BOWMAN.

[181 ILLINOIS, 421.]

MANDAMUS—COMPELLING EXECUTION OF DEED UNDER CERTIFICATE OF SALE.—Mandamus is not the proper remedy of one who is entitled to a deed under a certificate of sale to compel the execution of such deed by a master in chancery. His remedy is by summary proceeding to be heard before the chancellor.

MORTGAGES—FORECLOSURE—PARTIES DEFENDANT—REDEMPTION.—Where, upon a bill to foreclose a mortgage, a judgment creditor of the mortgagor is joined as a party defendant, a decree of foreclosure entered in such proceeding does not affect the statutory right of such judgment creditor to redeem from the sale.

MORTGAGES—FORECLOSURE—REDEMPTION BY JUDGMENT CREDITOR OF MORTGAGOR.—Where land has been sold under foreclosure of a mortgage thereon, a judgment creditor of the mortgagor may redeem from the sale at any time within the statutory period allowed him, and he does not lose this right by securing a deed to the premises from the mortgagor, after the latter's period of redemption has expired.

A bill was filed to foreclose a mortgage recorded June 30, 1894, and B. Goedde, a judgment creditor of the mortgagors, by a judgment entered September 28, 1896, was joined as party defendant and filed an answer. At a foreclosure sale on March 27, 1897, the property was purchased by Henry Mannle, to whom was issued a certificate of purchase, which he assigned to the plaintiff in error. Later, on July 23, 1898, the same property was sold under an alias execution issued on Goedde's judgment, and purchased by Goedde, to whom was issued a certificate of purchase entitling him to a deed after sixty days if no redemption. Goedde secured a certificate of redemption on June 24,

1898, for the amount required to redeem. On the same day, Goedde filed for record a deed to him from the mortgagors of the premises, dated June 22d, and acknowledged June 23d. After the expiration of the fifteen months allowed for redemption, the plaintiff in error presented his certificate of purchase to the master in chancery, the defendant in error, and, having demanded and been refused a deed to the property, filed his petition for mandamus to compel defendants in error to execute and deliver a deed to plaintiff. The petition being denied and judgment rendered in favor of defendant, after an ineffectual appeal to the appellate court, this writ of error was brought.

M. Millard, for the plaintiff in error.

Silas Cook, for the defendants in error.

423 PHILLIPS, J. It appears from the record in this case that a sale was made by the master under a decree of foreclosure and a certificate of purchase was issued. Subsequently, on the twenty-second day of June, more than fourteen months after such certificate of sale was issued, the mortgagees sold and conveyed their right of redemption to a judgment creditor. The certificate of purchase issued on the mortgage sale was assigned to the relator. The judgment creditor, who acquired the right of redemption from the mortgagors, redeemed from the sale under an alias execution issued on a judgment in his favor, recovered before the decree of sale. A levy was made under the execution of that judgment creditor who redeemed, and a sale under the execution and redemption was made for the amount of the redemption and the debt of the judgment creditor. That sale was made more than fifteen months after the expiration of the time of redemption under the certificate made on the mortgage sale, but the redemption was made within the fifteen months from the time of the sale under the mortgage. The relator, who holds the certificate under the mortgage sale, asked leave to file a petition in mandamus against the master in chancery to compel him to execute a deed in accordance with that certificate.

As a matter of practice, the application for leave to file a petition for mandamus should have been denied. Where a certificate of sale is issued by an officer of a court, such as the master in chancery, that officer, on notice, is before the court at all times, and may, by the chancellor, be compelled to discharge his duty in a summary proceeding to be heard before the chancellor, and such summary proceeding is a proper remedy to be

resorted to to compel the execution of a deed under a certificate of sale, where one is entitled to such deed, and not a resort to a proceeding by mandamus. If the latter ⁴²⁴ method is to be invoked, confusion in the determination of business by the chancellor and complication of the records would necessarily result, which could be avoided by a proper resort to a summary proceeding before the chancellor to compel his officer to comply with his duties. It might well be held that in a case of this character resort cannot be had to a proceeding by mandamus, and the petition for mandamus would have been obnoxious to a general demurrer for these reasons.

As a matter of practice, we have deemed it proper to consider these two questions that arise from an examination of this record, but are not raised by assignment of error on the part of the plaintiff in error or by assignment of cross-errors.

The theory of the relator is, that the bill having been filed by mortgagee against the mortgagor and B. Goedde, a judgment creditor of the mortgagor, the judgment creditor was not entitled to redeem after the expiration of one year, as the decree found. It was held in *Boynton v. Pierce*, 151 Ill. 197: "Where a party files a bill to foreclose a mortgage, and there are judgment creditors who have liens against the mortgaged premises subsequent to the mortgage, the judgment creditors are necessary parties to the bill to foreclose, but it has never been understood because they may be made parties defendant to a bill of foreclosure of the mortgage they lose their right to redeem as judgment creditors." In this case, it appears that B. Goedde had recovered a judgment against the mortgagors before the foreclosure of the mortgage; hence he, as a judgment creditor, was a proper and necessary party to that proceeding. But the decree rendered in this case did not deprive him of any right conferred by the statute upon a judgment creditor to redeem from the sale. The right conferred by statute on him as a judgment creditor was not cut off or abridged by reason of his having been made a party to the bill to foreclose, nor by virtue of anything found in the decree: *Wood v. Whelen*, 93 Ill. 153.

⁴²⁵ It is contended, however, by the plaintiff in error, that because of the fact that after the expiration of twelve months and before the expiration of fifteen months said Goedde obtained a deed from the mortgagors to the lands sold under the decree of foreclosure, he could not, as a judgment creditor, redeem his own lands. This position is not sound. The mortgagors themselves could not redeem after the expiration of

twelve months, and the creditor who took title from the mortgagors to whatever interest they had under their deed obtained no greater right than they had, and that conferred no right of redemption. The judgment creditor, as such, had a right to redemption before the execution of the deed, and the deed effected no merger of his judgment in the title so as to prevent such redemption. As held in *Boynton v. Pierce*, 151 Ill. 197: "Where a debtor becomes involved and is unable to pay his debts, and the creditors resort to a sale of lands on judgment, it is always desirable that the lands should bring as large a price as possible, in order that all creditors may be paid; hence, the law favors redemptions by judgment creditors." Under the redemption made by the judgment creditor, and sale thereunder, he bid the full amount necessary to redeem, as well as the amount of his judgment, and the holder of the certificate under the mortgage sale obtained the full amount to which he was entitled, and has no equitable right to a deed. Neither has he any legal right to a deed under the facts appearing in this record.

It was not error in the circuit court of St. Clair county to deny the writ and enter judgment for costs against the relator. The judgment is affirmed.

MANDAMUS—PRIVATE CONTRACT.—Mandamus does not lie to compel the performance of private contracts: *Florida Cent. etc. R. R. Co. v. State*, 31 Fla. 482, 34 Am. St. Rep. 30. A writ of mandamus is not regarded as an appropriate remedy for the enforcement of contract rights of a private and personal nature and obligations which rest wholly upon contract, involving no questions of public trust or official duty: *Tobey v. Hakes*, 54 Conn. 274, 1 Am. St. Rep. 114.

MORTGAGES—JUDGMENT CREDITOR—REDEMPTION.—The owner of a judgment, whether he is the plaintiff in whose favor it was rendered or his assignee, has the right to redeem from a foreclosure sale: *Extended note to Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 245. Parties acquiring interests in the property subsequent to the plaintiff in a foreclosure suit, and before its commencement, who are not made parties, possess both an equitable and the statutory right to redeem. If they are made parties to the foreclosure suit in which judgment is rendered under which sale is made, they are restricted to the statutory right to redeem: *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748.

BELLEFONTAINE IMPROVEMENT COMPANY v. NIEDRINGHAUS.

[181 ILLINOIS, 426.]

ADVERSE POSSESSION—TITLE BY—ACCRETIONS.—Adverse possession of land under color of title and payment of taxes for the time required by statute to give title gives title also to accretions to the land formed during that time, regardless of the question of how recently such accretions have formed.

ADVERSE POSSESSION—COLOR OF TITLE—OCCUPANCY OF PART.—Possession of part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed.

WATERS AND WATERCOURSES — ACCRETIONS — ISLAND CONNECTED WITH SHORE.—An island forming in a river and connecting with another island on one side is an accretion to the island with which it is connected and not to the lands on the opposite shore, although the connecting bar is sometimes free of water and sometimes submerged.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—Under the rule adopted in Illinois, the title of riparian owners on a river extends to the thread of the stream, and their boundaries change with the shifting of the channel.

WATERS AND WATERCOURSES—AVULSION AND ACCRETION—RIGHTS OF RIPARIAN OWNERS.—Where a considerable tract of land is, by the violence of a stream, and in consequence of its cutting a new channel, separated from one tract of land and joined to another, but in such a manner that it can still be identified, the ownership of such separated tract remains unchanged; but when the change is gradual and imperceptible, except by comparisons made at different points of time, the boundary of the deprived riparian owner remains, and follows the thread of the stream.

WATERS AND WATERCOURSES—BOUNDARIES BETWEEN STATES.—The boundary between the states of Illinois and Missouri, where separated by the Mississippi river, is the thread of the river.

EVIDENCE — DENIAL OF OWNERSHIP — EFFECT AGAINST GRANTEE.—Declarations of a former owner of land disclaiming title to an accretion to it are not admissible in evidence to defeat his grantee's claim to such accretion.

Julian Laughlin, E. C. Springer, and J. G. Irwin, for the appellants.

Travous & Warnock, for the appellees.

⁴²⁷ **PHILLIPS, J.** Appellees filed a bill for partition of and to remove a cloud from certain lands situated in township 3 north, range 10 west of the third principal meridian in Madison county, Illinois. The land is bounded on the south by the north line of the south half of section 23, and the western continuation thereof to the main channel of the Mississippi river; on the north by land of the Granite City, Madison, and Venice Water Company; on the east by a channel of the Mississippi

river known as "Gaboret slough"; and on the west by the thread of the stream in the main channel of the Mississippi river. The bill alleges that the complainants and the defendant the St. Louis Stamping Company are the owners of the land in equal portions, as tenants in common, by title derived through a regular chain of conveyances from the government, and by open, continuous, and adverse possession of the same by them and their respective grantors for upwards of twenty years, and by possession under claim and color of title made in good faith, with seven years' payment of taxes, as required by the statute. Appellants and about one hundred and fifty other persons were made defendants. The object and purpose of the bill are for partition of a tract of land known as "Gaboret island," and what are claimed and known as lands and accretions thereto.

Appellant, the Bellefontaine Improvement Company, a corporation of the state of Missouri, answered the bill, claiming ownership of a part of the lands sought to be partitioned, known as "Willow Bar island," and which is by it claimed to be situated in township 46 north, range 7 east of the fifth principal meridian of Missouri; ⁴²⁸ that it is bounded on the east by the old main channel of the Mississippi river and on the west by a new channel, known as "Sawyer's Bend"; that it also owns the bar lying immediately south of, and until recently a part of, the first-mentioned tract; that the improvement company claims the island and bar are in the state of Missouri and constitute a part of that state, and claims its title is a Missouri title, derived by regular chain of conveyances from the Spanish government. Appellant Turner also answered the bill, claiming title to fractional section 3, sections 10 and 11, and all of fractional sections 14 and 15 lying north of a line running east and west, parallel to and five and twenty-eight one hundredths chains south of the south line of said sections 10 and 11, in the state of Illinois.

There were numerous disclaimers filed and numerous defaults entered. A decree was entered in accordance with the prayer of the bill, and the defendants, the Bellefontaine Improvement Company and J. B. Turner, prosecute an appeal to this court.

The determination of the controversy between the Bellefontaine Improvement Company and appellees depends on whether the island and bar are in the state of Illinois or in the state of Missouri—or, in other words, where the thread of the stream of the main channel is with reference to the lands in controversy. As a part of the controversy, it is necessary to determine

whether Willow bar became and was a part of lands attached to the Missouri shore and constituted a part of the Missouri lands at any time, and whether it was separated therefrom by avulsion. The question in dispute between Turner and appellees is based on the claim of the former to title by reason of certain conveyances and an alleged judgment in ejectment on January 30, 1874, and is a controversy depending on the title of the respective parties.

It was admitted by both appellants in open court, on the hearing, that on the twenty-eighth day of January, 1896, immediately preceding the commencement of this suit, the ⁴²²⁹ complainants and the defendant the St. Louis Stamping Company had title to all the real estate involved in this suit by the deeds introduced in evidence as color of title, with seven years' continuous possession under claim of title and payment of taxes successively for said period, and by continuous adverse possession for a period of twenty years immediately preceding said January 28, 1896, except fractional section 3 of lot 3 of the Woolridge subdivision, known as the "Beckman tract," and accretions thereto, and the island known as "Willow Bar island," and the lands lying west of the west high bank of Gaboret island.

The appellant Turner claims that Gaboret island, with the exception of fractional section 2, was patented to William Rector. Rector conveyed the north half, to wit, fractional sections 3, 10, and 11 and the north parts of 14 and 15, to William O'Hara in 1820. Helen O'Hara Harrel, as sole heir-at-law of William O'Hara, conveyed the same, along with other property, to one Kibbe in 1868. Kibbe recovered a judgment in 1874 against Beckman for possession of fractional sections 3, 10, and 11, and the north part of 14 and 15. Kibbe conveyed the same property, in 1877, to the appellant Turner. Appellees' title to section 3 (which is claimed by Turner) is based upon a tax deed made in 1843, while their title to section 2 originates from the government. The two sections were united in October, 1857, in the conveyance from Hawkins et al. to Hopkins, and passed by mesne conveyances to complainants below and the St. Louis Stamping Company, each deed describing both tracts. The two fractional sections adjoined, and were used and occupied by appellees and their grantors as one farm. They were so inclosed and used by the Fishers under proper deed and claim of ownership continuously for nearly thirty years.

It is shown that fractional section 2 was conveyed to appel-

tees by mesne conveyances from John Stein, who was the patentee thereof. Fractional section 3 was conveyed ⁴³⁰ to appellees by mesne conveyances from Thomas F. Purcell, who acquired the same by a tax deed from the auditor of state, of date August 12, 1846. Subsequently, the appellees, seeking to further protect their title, offered in evidence a deed of date September 17, 1880, from Frederick Beckman and wife to John Schenk, conveying lot 3. Schenk conveyed to his wife, by will, all his real estate, and June 4, 1887, she conveyed to Peter Schenk, and Peter Schenk and wife conveyed to the St. Louis Stamping Company on May 22, 1891. These latter mentioned conveyances show color of title in the St. Louis Stamping Company, who, with appellees, claim to own the land in controversy, a partition of which is sought.

With these conveyances the evidence shows that appellees and the St. Louis Stamping Company paid taxes on fractional sections 2 and 3 from 1885 to 1891, inclusive. This is, as to these lots, color and claim of title and payment of taxes for seven successive years. Fractional sections 2 and 3 having been used continuously under proper deeds and claim of ownership for nearly thirty years as one farm by parties in privity with the title of appellees, appellees, with their grantors, were in adverse possession of fractional sections 2 and 3 for more than twenty years. This possession was with claim of ownership.

Appellants contend that a claim of title by accretion cannot be sustained where the accretion is to land held by claim and color of title and payment of taxes, or to lands held under twenty years' limitation. When adverse possession has ripened into a title, that title relates back to the inception of the possession. It is not necessary that a party should have lands inclosed before he can be said to be in actual possession. It was said in *Fisher v. Bennehoff*, 121 Ill. 426, 439: "When he has color of title, possession may be shown by the constant and uninterrupted use through a series of years, and of timber land by taking therefrom wood for fuel, fences, and other purposes; or it may be shown by an actual occupancy of ⁴³¹ a portion of a tract for which he may have a deed, under which possession is held. In such cases, the deed may be regarded as enlarging the possession to all the land it includes." It was held in *Dills v. Hubbard*, 21 Ill. 328: "If he makes entry under a conveyance of several adjoining tracts, his actual occupancy of a part, with a claim of title to the whole, will inure as an adverse possession of the entire tract. Possession is to be regarded as coextensive

with the description in the deeds under which he enters, and the original entry as a disseisin of the owner to the same extent." It was held in *Saulet v. Shephard*, 4 Wall. 502: "Where one has been in the uninterrupted and peaceable possession for more than twenty years of the property or real estate to which the accretions sued for are attached, as long as they exist he owns such accretions."

In *Benne v. Miller*, 149 Mo. 228, in speaking of the character of possession necessary to constitute adverse possession, the court say, quoting from *Ewing v. Burnett*, 11 Pet. 53: "To constitute adverse possession there need not be a fence, building, or other improvement, and it suffices for that purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; that much depends upon the nature and situation of the property, the uses to which it is applied and to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule in all cases, but that it may be safely said that where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of the adverse claimant, without interruption or an adverse entry by him, such acts are evidence of the ouster of the former owner and an actual adverse possession, provided the jury shall think that the property was not susceptible of a more ⁴³² strict or definite possession than had been so taken and held; that neither actual occupancy, cultivation, or residence are necessary where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim."

In speaking of possession as applied to accretions, the court said: "An accretion becomes a part of the land to which it is built, and follows whatever title covers the main land, whether it be title by deed or title by possession. In its nature it is not susceptible, during its forming, of that kind of possession which distinguishes the occupation of dry land. But it attached to the dry land even while it is under water, and belongs to the owner of the land, and is in the actual possession of him who holds the actual possession of the main land. If the main land is in fact unoccupied, it is in the constructive possession of the owner of the true title, and that gives constructive pos-

session of the forming accretion. But if the main land is held in adverse possession to the true owner, he is not in constructive possession of the accretion; and since the accretion, in its formative state, is not susceptible of actual occupancy in the sense of a *pedis possessio*, the indicia of the actual possession of him who held on the main land are extended over the forming accretion and bring it within his actual possession. And it is not necessary that such possession of the accretion should be held for ten years to give a possessory title, because title to it follows title to the main land; and when the latter is held under the conditions and for the length of time required by law to vest the title in the possessor, the title to the accretion follows, even though the deposit had been made but a year or a day. One who acquires title to the main land by ten years' adverse possession acquires title to cover deposits made and making ⁴³³ on his front and during the period in which his possessory title was forming. The accretion grows into the land, and grows into the title of him who holds the land as the title itself grows, and when the title to the main land has become perfect it extends over the accretion, however recent its formation."

Under these authorities, it is clear that a title by possession merely is sufficient to maintain title to accretions to land the title of which is so held by possession. Where one acquires title by reason of color of title and payment of taxes, accretions to land to which the title is thus held go with the land to which it is such an accretion, to the same extent as to a title obtained directly from one holding the patent title.

The evidence showing that as to fractional sections 2 and 3 there was color of title and payment of taxes, with open, notorious, exclusive, hostile, and adverse possession on the part of appellees, their title was sufficient to authorize the decree as to these tracts. Further than that, the title to fractional section 2 is shown to be in appellees by transfers from the patentee of the same, and that it, with fractional section 3, was for a period of about thirty years a part of one farm, and together were conveyed by deed by various grantors who were in privity with the title of appellees, and there being such actual, open, notorious, and adverse possession for the period of more than twenty years, with claim of title, that possession and claim of title were sufficient, and would draw to the possession all the lands described in the deed, and this would authorize the decree as entered as to these two tracts. It was held in *Zirngibl v. Calumet Dock Co.*, 157 Ill. 430: "It is, of course, settled law that possession of

part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed."

Gaboret island, lying in the Mississippi river on the Illinois side thereof, has been in existence as an island ⁴³⁴ since the river was known, so far as the evidence in this record shows, and was surveyed and platted by the United States government as a part of Illinois. Opposite Gaboret island, in the state of Missouri, a tract of land was granted to Hyacinth St. Cyr before the purchase of the Louisiana territory by the United States government, and the tract so granted to St. Cyr was confirmed as United States survey No. 3, and through mesne conveyances the Bellefontaine Improvement Company claims title to that tract. Gaboret island was patented to William Rector by the United States, and through mesne conveyances from him, and through color of title, payment of taxes, and by possession and limitation, the greater portion thereof became the property of appellees and the St. Louis Stamping Company. By the enabling act of April, 1818, under which Illinois was organized as a state and admitted to the Union, the middle of the Mississippi river was made its western boundary. By the enabling act of March 16, 1820, under which Missouri was organized as a state and admitted to the Union, the middle of the main channel of the Mississippi river was made its eastern boundary. An island was formed in the Mississippi river between Gaboret island and the western bank of the Mississippi river, which appellees claim is in the state of Illinois and appellants insist is in the state of Missouri. This island is known as "Willow Bar island." Taking into consideration the manner of its formation and its extent, it is clear that it is an island in the Mississippi river, and its ownership is to be determined by the determination of the question whether it is an accretion to lands on the Missouri side or to Gaboret island.

As to the formation of the island, it is shown that between Gaboret island and the Missouri shore there were fluctuations in the channel which rendered the navigation of the river difficult. The weight of evidence, however, shows that the navigable channel was on the western side of the river prior to the formation of this ⁴³⁵ island, as it has been a greater part of the time since. The evidence with reference to the time when it first was formed is conflicting. The appellants claim that the island was formed by reason of the sinking of certain boats, the first of which sank about 1853. The evidence is, in substance, as follows: William Marcum, who moved with his parents upon

Gaboret island in 1844, testified that he saw Willow Bar island there as early as 1847, and that he saw the boat "Altona" sink on the west side of the bar in 1856, in what was then the main channel. Captain Seeborn Miller, an old pilot who knew the river intimately in 1847, swears that Willow bar was there at that time, and that the main channel was always west of it. Captain Parker, an old pilot whose recollection of the river extended back to 1850, swore that Willow bar was there then, having trees upon it. His brother, Captain Thomas Parker, who knew the river since the early forties, testified that Willow bar formed before the sinking of the boats, and that the main channel was always west of it. Henry Cremer, a resident and former land owner on Gaboret island, knew Willow bar since 1854, and had on different occasions seen the water in Pocket chute so low that Gaboret island proper and the bar were practically connected, and states that the channel was always on the west side. Henry Kueter, another old pilot whose knowledge of the river dates from 1854, says the channel was always west of Willow bar. Buttron, who testified for the appellants, swore the island formed in the middle of the river, leaving a channel on both sides. Marsh, a witness for appellants, said he did not know what caused the bar, but that to his knowledge the channel had been west of it for upward of twenty years. Appellants' witness Montgomery, who knew the river intimately from 1852, swore that they always ran west of the bar, and that it formed east of the main channel in which the boats sank. Monroe, a witness for appellants, and who was upon Willow Bar island as early ^{as} as 1858, a year before one of the boats (the "Baltimore") sank, says there were then trees from four to six inches in diameter upon it. The testimony of Pepper, Leverett, Schenk, Pitzman, Roberts, Hirt, and other witnesses shows that the channel was always to the west of the island as far back as any of them could remember. There is testimony in the record showing that between 1878 and 1883 (the time not being fixed with certainty), for a period of about two years consecutively, the channel was on the east side of Willow bar.

The evidence with reference to the wrecks of the boats is, that the "Cornelia" sank in 1853, near the Missouri shore, and the "Altona" two or three years after, five or six hundred yards east of the Missouri shore; that the "Baltimore," the largest boat, sank in 1859, about two hundred feet west of the "Altona"; that the "Badger State" sank on top of the "Altona"; that the "M. M. Runyan" struck on the "Baltimore" and sank

below her; that the "Keithsburg" sank in the same neighborhood. All of these boats sank in the winter, when the water is generally lowest and when the boats must follow the main channel most closely. Not only did these boats all sink as stated, but some of the wrecks are still west of the Willow Bar island, the largest (the "Baltimore") being at the extreme western side, and visible only when the water is so low as to be only two or three feet above zero on the St. Louis gauge.

Willow Bar island at present is separated by the main deep-water channel from the Missouri shore, while only a shallow stretch of water separates it from the Illinois shore. A number of witnesses have testified to occasions when it was so connected with Gaboret island proper that persons could walk from one side to the other. Being so connected that there was land, sometimes free of water and sometimes submerged, actually connecting it with Gaboret island, constituted it an accretion to the latter.

⁴³⁷ It has been the uniform rule of this court that the title of Illinois proprietors to land on a river extends to the thread of the current or main channel: *Middleton v. Pritchard*, 3 Scam. 510, 38 Am. Dec. 112; *Trustees of Commons v. McClure*, 167 Ill. 23; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 545; *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Griffin v. Kirk*, 47 Ill. App. 258; *Griffin v. Johnson*, 161 Ill. 377. And his boundary changes with the changes of the center of the river's main channel: *Houck v. Yates*, 82 Ill. 179; *Nebraska v. Iowa*, 143 U. S. 359. In *Nebraska v. Iowa*, 143 U. S. 359, it was held: "Frequently where, above the loose substratum of sand, there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the substratum of soil into the river, so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must always be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony: that while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water. . . . The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below and upon either shore. There is, no

matter how rapid the process of subtraction or addition, no detachment of earth from one side and deposit of the same upon the other. The one thing which distinguishes this river from the other streams in the matter of accretion is in the rapidity of the change caused by the velocity of the current, and this, in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto." The court sums up the controversy in this language: "Our conclusions are, that, notwithstanding the rapidity of the changes in ⁴³⁹ the course of the channel and the washing from the one side and onto the other, the law of accretion controls on the Missouri river as elsewhere, and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states."

On the same character of question this court held in *Buttenth v. St. Louis Bridge Co.*, 123 Ill. 552, 5 Am. St. Rep. 545: "Commercial considerations make it imperative, where states or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass. That is the 'channel of commerce'—not the shallow water of the stream which at some seasons of the year may be impossible of navigation—upon which each nation or state demands the right to move its products without any interference from the state or nation occupying the opposite shore." The court also said in that case: "Where a river is a boundary between states, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at other times."

Under the rule announced in these cases it is clear that the boundary line between Illinois and Missouri is, and by the weight of evidence has always been, west of Willow Bar island, as the thread of the stream is west of that island. Willow Bar island is about two miles long, and, if any other rule were adopted than that here declared, then the boundary between the state of Missouri and the state of Illinois would, for a distance of two or three miles, not be the thread of the stream, as the thread of the stream would be wholly in the state of Missouri. It is true that in the uncommon case of avulsion, where a considerable tract of land is by the violence of the stream and in consequence of its cutting a new channel separated from one tract of land and joined to another, but in such manner that it can still be identified, ⁴⁴⁰ the property of the soil so re-

moved or the tract so cut off by the change continues vested in its former owner; but where the change is gradual, so that it cannot be determined what land has been taken off by the violence of the stream, or when its taking away took place, in such case a gradual change of the stream causes the center thread of the stream not only to constitute the boundary of the proprietor's land on that stream to the center thread, but constitutes the boundary of the state. It cannot be said that this record contains any satisfactory evidence of any such sudden change of the thread of the stream as would amount to an avulsion. The change, where any change was made, was gradual and insensible. Neither is there any evidence showing that Willow Bar island itself was, as a tract of land, cut off from the Missouri shore, but the evidence shows the gradual formation of an island in the stream, and the law of accretions is applicable thereto.

We hold, therefore, the boundary line between the states of Illinois and Missouri, as well as the boundaries of Illinois proprietors, is the present center thread of the stream between Willow Bar island and the Missouri bank.

Neither are the rule announced in the foregoing cases and the principles herein announced in conflict with the adjudications of the supreme court of the state of Missouri. It has been held by the supreme court of that state that where the owner of land in Missouri bordering on the Mississippi river loses a portion of the same by its being submerged or washed away, and a tow-head forms in the river between his land and an island opposite thereto, and land gradually accrues to the tow-head and extends toward his land and within the limits of his original survey, it is, nevertheless, not an accretion to his land and he has no right thereto: *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450. . To the same effect is *Cooley v. Golden*, 117 Mo. 33.

It is insisted by the appellants that the court erred in excluding evidence offered by them, by which they ⁴⁴⁰ sought to prove that certain owners of lands on the west side of Gaboret island, opposite Willow Bar island, did not claim that Willow Bar island was a part of Gaboret island. There was no error in excluding this testimony. Owners of land or of any interest therein could not, by any declarations made by them, prejudice the title of their grantee. Neither would their declarations be binding on the appellees, who acquired title through them, for the reason that an accretion to the land purchased from them is determinable solely by reference to the fact of accretion to

those lands, and not by an assertion of a claim of ownership. It was not error to exclude that evidence.

From a careful examination of the record we find no error in the decree, and it is affirmed.

ADVERSE POSSESSION—COLOR OF TITLE—OCCUPANCY.—

The possession of a mere trespasser is confined to the premises actually occupied by him, but the possession of one claiming under color of title is coextensive with the boundaries described in the written instrument under which he claims title: *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45; note to *Willamette Real Estate Co. v. Hendrix*, 52 Am. St. Rep. 806.

WATERS—RIPARIAN OWNERS.—The title of a riparian owner of land on a river extends to the middle of the stream, if it is non-navigable, and to the line of the high water, if navigable: *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48. But see the extended note to *Allen v. Weber*, 27 Am. St. Rep. 56, where the entire question is discussed and the conflicting decisions harmonized.

WATERS—BOUNDARIES BETWEEN STATES.—The boundary between the states of Illinois and Missouri is the thread of the main stream of the Mississippi river: *Butenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 545.

EVIDENCE.—DECLARATIONS OF A VENDOR MADE AFTER HE HAS TRANSFERRED property are not admissible, as against his transferee, to impeach the transfer: *Welcome v. Mitchell*, 81 Wis. 566, 29 Am. St. Rep. 913, and note. See the extended note to *Horton v. Smith*, 42 Am. Dec. 632.

Some Features of the Law of Accretions Applicable to Islands in Navigable Rivers.*

In previous notes in this series, the rules of law governing accretion, alluvion, avulsion, and reliction have been extensively considered. To avoid repetition, we shall give this note a restricted scope, confining our attention to that interesting, though not extensive, line of cases, which, like the principal case, apply the general rules above mentioned in the adjustment of conflicting claims of title to bars or islands, and accretions thereto. It is a line of cases that may be said to be peculiar to American jurisprudence. The question therein raised and considered could arise but rarely, if ever, in England, where the rivers are small, and the common law as to riparian rights obtains. The American cases have generally arisen in the west, especially in those states which are traversed or bounded by the Mississippi and Missouri rivers. The immense length and volume of these rivers, and their liability to floods and sudden changes in the velocity of their currents, taken with the peculiar quality of the land through which they flow, furnish a combination which has proven immensely fertile in legal conundrums.

Islands in Navigable Waters—Accretions Thereto.—At the common law, all nontidal streams were treated as non-navigable, and along

*REFERENCE TO MONOGRAPHIC NOTES.

Alluvion and reliction: 33 Am. Dec. 276-281.

Accretions due to artificial causes: 16 Am. Rep. 524-528.

Rights to bars and islands formed by accretions: 53 Am. Rep. 215-221.

Accretion and alluvion: 35 Am. St. Rep. 307-313.

them the rights of riparian owners extended to the middle or thread of the stream. In the United States, it is generally held that riparian owners on non-navigable waters take to the center thereof, and that land covered by navigable waters belongs to the state in trust for the public, but it has been necessary to modify the common-law doctrine which made navigability, in a legal sense, a characteristic of tidal waters only, for it is not an exaggeration to say that the most important part of our navigation, commercially, is upon nontidal waters. Navigability, under these conditions, has become largely a matter of pure fact, and legislatures and courts have tended toward that theory. "Some of our rivers," said Mr. Justice Field, in *Packer v. Bird*, 137 U. S. 667, "are navigable for many hundreds of miles above the limits of tidewater, and by vessels larger than any which sailed on the seas when the common-law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers which are navigable in fact." In Illinois, the common-law rule is adhered to, and riparian owners take to the center of a navigable stream: *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, ante, p. 269; while in Iowa the contrary is vigorously maintained: *McManus v. Carmichael*, 8 Iowa, 1; similarly in New York: *People v. Canal Appraisers*, 33 N. Y. 461; distinguished and affected as authority by *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; Pennsylvania: *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; and Missouri: *Rees v. McDaniel*, 115 Mo. 145; *Cooley v. Golden*, 117 Mo. 33. This subject is amply considered in the cases cited, and in the monographic note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226. It is only of collateral importance to our subject to this extent that whether or not an island or bar is public property, or attaches to the holding of the nearest riparian proprietor by virtue of the common-law rule, may often be the material consideration governing the right to accretions.

Elementary Rules Governing Accretions.—It is fundamental in the law of accretions that the lands to which they attach must be bounded by the river or stream to entitle its owner to such increase. "In the very nature of things, then," said the Missouri supreme court recently, "accretions depend upon actual contiguity, without any separation of the claimant's land from the accumulated alluvion by the lands of another, however narrow the intervening strip may be, or whatever the size of the claimant's tract behind it": *Sweringen v. St. Louis* (Mo.), 52 S. W. Rep. 346. Where there is a controversy as to the ownership of alluvion, the first matters to be ascertained are, Where did the accretion begin, and in what direction did the formation proceed? To support one's claim thereto, it must appear that the accretion began at his water's edge and extended outward therefrom: *Perkins v. Adams*, 132 Mo. 131; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *Hahn v. Dawson*, 134 Mo. 581; *Wallace v. Driver*, 61 Ark. 429. Accretions must also, in their formation, preserve uninterrupted contiguity. In a word, there is nothing saltatory about accretion. The doctrine of accretion will not admit of jumping a slough forty to sixty yards in width: *Crandall v. Smith*, 134 Mo. 633, 640. From the foregoing, it necessarily follows that al-

luvion cannot become an accretion to land by extending itself until it meets the land.

Accretions to Islands.—Islands or bars arising in navigable waters are held to belong, in the first instance, to the public or sovereignty. As far as concerns the subject of this paragraph, however, it is immaterial whether such an island or bar be the property of the state or of a private individual: *People v. Warner*, 116 Mich. 228; *Benson v. Morrow*, 61 Mo. 345; *Bigelow v. Hoover*, 85 Iowa, 161, 39 Am. St. Rep. 296. In either case, the application of the law of accretions is the same—accretions to an island or bar become the property of the owner thereof. His rights in this regard are commensurate with those of any riparian proprietor: *Benson v. Morrow*, 61 Mo. 345; *Linthicum v. Coan*, 64 Md. 439, 54 Am. Rep. 775; *People v. Warner*, 116 Mich. 228; *Tatum v. St. Louis*, 125 Mo. 647; *Naylor v. Cox*, 114 Mo. 232; *Cooley v. Golden*, 117 Mo. 33; *Fillmore v. Jennings*, 78 Cal. 634; *Bigelow v. Hoover*, 85 Iowa, 161, 39 Am. St. Rep. 296; *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 Am. St. Rep. 150. It not infrequently happens that accretions beginning at the edge of a bar or island increase the size of the bar or island until it joins with the mainland, or another bar or island. Such a case affords no reason for varying the ordinary rule that accretions belong to the land upon which their formation begins and from which it extends: *Naylor v. Cox*, 114 Mo. 232; *Cooley v. Golden*, 117 Mo. 33; *Tatum v. St. Louis*, 125 Mo. 647; *Hahn v. Dawson*, 134 Mo. 589; *Orandall v. Smith*, 134 Mo. 633; *People v. Warner*, 116 Mich. 228.

In *Naylor v. Cox*, 114 Mo. 232, the land in controversy was certain made land connecting "Naylor's island," owned by the plaintiff, with defendant's land, between which and the island the Missouri river had formerly run. The sole question raised and considered was as to whether the land in controversy was an accretion to the island or to the mainland. The conflicting evidence being submitted to the jury, which found for the plaintiff, the sole matters submitted to the appellate court concerned the correctness of the trial court's action in giving certain instructions and refusing to give others. The law was deemed to have been correctly stated in instructions given at plaintiff's instance: "1. That if the land in controversy was gradually added to and formed against Naylor's island, and the water gradually receded from said island and ran next to the north shore, until finally there was only a slough between said island and the north shore, then the 'made' land between the slough and the island became part of the island, and plaintiff should recover as to any part of the made land in defendant's possession; . . . 3. That if a sand bar was first formed against the north side of Naylor's island and gradually extended from said island toward the main shore, and filled up, making solid land, and that the land in controversy was formed in that way against said island, and that the main body of water flowing north of said island ran next to the north bank, and between the land sued for and the north of said river, the said river channel gradually changed and moved southwardly, until it finally got on the south side

of an island in said river known as 'Naylor's island,' and that as said river moved southwardly, soil and other substances were, by action of the water of said river, deposited at and against the land now owned by defendant, the court instructs you that said deposits at and against said land now owned by defendant are accretions or 'made lands,' and belong to the defendant; 4. That owners of land bounded by the Missouri river are riparian proprietors or owners, and are obliged to sustain all damages done to their lands by the action of the waters of said river; and that they are also entitled to all the benefits which may result by the deposits of soil on or against their lands by the waters of said river. These deposits are called accretions or 'made lands,' and, if you believe from the evidence in the case that the land in controversy or any part of it has been deposited at or against defendant's lands by the natural action of the waters of said river, and that such deposits have added to defendant's lands, he is as much the owner of said accretions as if he had actually purchased the land from the government of the United States, plaintiff cannot recover any of said made land or accretions, and you should so find." This case is illustrative of the class to which it belongs, and among which it is cited in the preceding paragraph.

Apportionment of Accretions.—Thus far we have noticed only questions arising where accretions in controversy have had but one source and proceeded from but one direction. But in the changes which result in expelling water which has formerly separated the land holdings of different proprietors and in joining such holdings, it must often happen that the made land thus laid open to private ownership is the result of accretions beginning at opposite water lines and proceeding in opposite directions. In *Buse v. Russell*, 86 Mo. 209, it appeared that the intermediate space between a survey on the mainland of the Missouri river and a surveyed island consisted, at the time of the survey, of a slough, and that since then the slough had so filled up as to make the island and the mainland one continuous tract of land. The owner of the survey having taken possession of the island, it was properly held, in ejectment, that if the closing of the slough was due to accretions beginning both at the island and the survey, the respective proprietors were entitled to their holdings, and the line of contact of the accretions would become the boundary line between them. To the same effect are *Bigelow v. Hoover*, 85 Iowa, 161, 39 Am. St. Rep. 296; *Salem Improvement Co. v. McCourt*, 26 Or. 93; *Benson v. Morrow*, 61 Mo. 345; *Hahn v. Dawson*, 134 Mo. 581. In *Buse v. Russell*, 86 Mo. 209, it was also held that if the connection between the island and the survey was brought about by the unnavigable slough separating them simply filling up from the bottom, the adjacent proprietors would each take to the center of the slough.

The apportionment of the accretions in such cases can rarely be made with more than substantial accuracy. It would be manifestly impossible to draw exactly the line of meeting between accretions

moving in one direction and those moving in the other. There are, however numerous natural considerations which may be called to the aid of courts and juries where they are called upon to act in such a case. Where there is a conflict in the evidence, some tending to prove one theory and some another, the question as to the manner, direction, and extent of accretions should be submitted to the jury: *People v. Warner*, 116 Mich. 228; *Buse v. Russell*, 86 Mo. 209; *Naylor v. Cox*, 114 Mo. 232. The character of the timber growth adjacent to and upon made land in controversy may sometimes indicate the proper solution of such a question: *Naylor v. Cox*, 114 Mo. 232. The jury may well take into consideration physical evidences of this and similarly relevant character as well as the bare assertions of witnesses: *Buse v. Russell*, 86 Mo. 209. Thus, it was said in *Shoemaker v. Hatch*, 13 Nev. 261: "To determine whether a bar or island is part of the land on either side of a stream, account must be taken in every case of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the meander line and the main channel." The topography of the land in controversy and that adjacent to it may reveal the nature of the process by which "made lands" were formed. An illustration of this is given in *Posey v. James*, 7 Lea, 98, where it was said: "There is some conflict in the testimony in the case at the bar as to whether the formation by alluvion commenced on James' land, or began as an island formation in the river. The decided preponderance is in favor of the formation on and from the bank. The fact that in times of high water a slough runs through the new-made land near the bank does not weaken the proof that the accretions began at the bank. River men, who have had an experience of many years, and whose duty it was to observe such things, fix the beginning on the bank, and explain the depression through which water passes at high water by the statement that the superior height out in the river over the height at or near the bank may be, and often is, caused by the current coming in contact with eddy water and thereby floating more of the alluvion farther out, or by winds operating upon the water carrying the alluvion. The proof shows satisfactorily that the formation, sometimes called a 'backbone,' commenced at the bank and gradually grew, extending into the river in the direction of the island known as 'The Old Hen,' and that its growth and depression depended upon the causes mentioned."

Erosion and Re-formation Over Same Area.—Where the upper end of an island is taken away by erosion, but a portion remains, at the lower end of which alluvion is deposited as accretions thereto, or if the shifting process be so rapid and perceptible as to be properly called avulsion, the owner of the island, of course, takes title to such newly formed land: *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 Am. St. Rep. 150. The distinction between the formation of alluvion by "avulsion" on the one hand, and "gradual and imperceptible accretion" on the other, becomes one of doubtful force and validity when

used in speaking of alluvion in the great rivers of western America. Where it is possible to identify land newly formed with land that has previously been taken away by the action of water, this statement does not hold, but the term "avulsion," when used in connection with those rivers, has its proper application narrowed to cases where the water boundaries of land are suddenly changed. In such cases, avulsion works no change of ownership: *Benson v. Morrow*, 61 Mo. 345. Where land is completely washed away and land is afterward re-formed by alluvion over the same area, the re-formed land does not necessarily belong to the original owner, but does belong to the owner of the land to which it is added by accretions beginning at the water's edge. This rule is applicable in most extreme cases. Says the supreme court of Connecticut: "If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation and is not affected in any manner by the relations of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate lot": *Welles v. Bailey*, 55 Conn. 292. 310, 3 Am. St. Rep. 48. So, where an island under private ownership is mostly washed away, and subsequently, by accretions to the land of a riparian owner, the land of the latter is extended until it covers in part the former site of the island, the remade land belongs to the riparian owner: *Rees v. McDaniel*, 115 Mo. 145. If an island in a navigable stream were to be completely washed away, and at a later period an island were to be formed upon the same area, it would logically follow that the owner of the original island would have no title to the newly formed island, which would become the property of the state, being an accretion to the bed of the stream. This state of facts was referred to, but did not arise, in *Buse v. Russell*, 86 Mo. 209.

Government Survey Lines and Newly Formed Lands.—It has been vigorously maintained that under our system of government surveys a grantee of the government takes absolute title to the definite portion of the earth's surface included within the lines of the survey under which he purchases, and that under no changes caused by the shifting of river channels or the growth of accretions, can such grantee take title to land not included within his survey lines, or be divested of title to any portion of the earth's surface included by those lines:

See dissenting opinion of Bunn, C. J., in *Wallace v. Driver*, 61 Ark. 437. This position, under the few authorities available upon the question, must be regarded as untenable. Where the Missouri river gradually cut into the boundaries of a quarter section owned by plaintiff until its main channel was within such boundaries, where it remained for a number of years, it was held that plaintiff took no title to a towhead appearing in the new channel and within the boundaries of his quarter section, and extending itself by accretions toward plaintiff's land: *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450. If the land thus remade consists of accretions to the land of another, the latter may claim it, although it extends beyond his lines and into the survey which was previously in part washed away: *Naylor v. Cox*, 114 Mo. 232. To the same effect: *Wallace v. Driver*, 61 Ark. 429. The application of the general law of accretions is in no way varied by the fact that accretions may have been encouraged or wholly caused by artificial obstructions in a stream: *Tatum v. St. Louis*, 125 Mo. 647; *St. Clair Co. v. Lovington*, 23 Wall. 66; *Lovington v. St. Clair*, 64 Ill. 56, 16 Am. Rep. 516.

What is an Island.—In *Perkins v. Adams*, 132 Mo. 131, the court avoided attempting to define what constitutes an island. It may be said that to constitute an island in a river the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river, and not a sand bar, subject to overflow by the rise of the river and connected with the mainland when the river is low: *Hahn v. Dawson*, 134 Mo. 581, 589. A gravel bar in the bed of a navigable river, over which steamboats can pass in ordinary high water, and on which no trees grow and there is no soil, is part of the bed of the river, and cannot constitute alluvion added to the land of a riparian owner: *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195.

YOCKEY v. SMITH.

[181 ILLINOIS, 564.]

WAREHOUSEMEN—PUBLIC—WHO ARE.—One who operates two grain elevators, wherein he stores grain for compensation, is a public warehouseman within the meaning of a constitutional provision defining public warehouses as, "All elevators or storehouses where grain or other property is stored for compensation, whether the property stored be kept separate or not."

WAREHOUSEMEN—TITLE TO GRAIN STORED.—Proprietors of public warehouses do not become the owners of grain stored therein, but are mere custodians, charged with the duty to restore in quantity and quality such grain as they may receive.

TROVER—WHO MAY MAINTAIN—LEVY UPON GRAIN IN WAREHOUSE.—The owner of grain in a public warehouse having a present right to the possession thereof may, after a demand and refusal, maintain trover against an officer who levied upon and sold the same under writ against the warehouseman, although the officer came lawfully into possession of the grain.

WAREHOUSEMEN—TITLE TO GRAIN STORED—LEVY OF EXECUTION.—Grain stored in a warehouse under a contract that it shall be subject to the order and control of the depositor remains his property and cannot be seized and sold for the debts of the warehouseman, whether the warehouse be a public or private one.

Widmer & Widmer, Henry Mayo, and Butters, Carr & Gleim, for the appellant.

Charles S. Cullen, for the appellee.

⁵⁶⁵ CRAIG, J. It appears from the testimony introduced on the trial that Harrington was a grain dealer at Marseilles. He bought, shipped, and sold grain on his own account and received grain in store from farmers in his elevators. He operated two elevators, one known as the "Harrington" or "Railroad elevator" and the other as the "Schroeder elevator." Appellee, being the owner of about three thousand bushels of oats and five thousand bushels of corn, hauled and stored it in the elevators operated by Harrington, under an agreement, as the evidence tends to show and as the appellate court found, that it was to remain his grain, ⁵⁶⁶ subject to his own order, until such time as he saw fit to sell, but the agreement provided that appellee should pay one-quarter of a cent per bushel per month after the first day of November, if left until that time. The grain was delivered from time to time, commencing in June and ending September 29, 1897. In July, two thousand seven hundred bushels of the oats were sold to Harrington, but the balance of the grain remained in store. The execution upon which appellant seized the grain came into his hands on October 1, 1897, and was levied the next day. The property was sold and the proceeds applied in satisfaction of the execution and other executions which appellant had received against Harrington October 1 and 2, 1897.

Under the facts the question presented is, whether the grain in question was the property of Harrington, and, as such, liable to be taken and sold under execution against him, or whether it was the property of appellee.

Section 1 of article 13 of the constitution declares: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." The appellate court found as a fact that the grain in question was stored under a contract, under which appellee was to pay, as compensation for storage, a certain amount per bushel after November

1, 1897, and this finding, in connection with the evidence showing the time and manner in which Harrington had been engaged in the grain and warehouse business, establishes as a fact that the warehouses kept by Harrington were public warehouses, within the meaning of the constitution and the statute of July 1, 1871 (Hurd's Stats. 1897, c. 114), and that the grain of appellee was received by Harrington as a public warehouseman. If Harrington received the grain as a public warehouseman, the title to the property did not pass to him but remained in appellee, and it could not be taken and sold for Harrington's debts. In *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137, where a similar ⁵⁶⁷ question was involved, it was held that where grain is consigned to a public warehouse and is there stored in bins, mingled with other grain of like character and grade belonging to different persons, so that its identity is lost, upon the refusal of the warehouseman to deliver, upon the presentation of the proper warehouse receipts, the quantity of grain and of the grade called for by such receipts, the holder of the receipts may maintain trover for the recovery of damages. It was also held that, if the warehouse and grain are transferred, the person to whom the transfer was made would in like manner be liable to the parties who had stored the grain. In *Snyder v. Blatchley*, 177 Ill. 506, it was held that one engaged in buying and shipping grain, and also in storing grain for others in elevators situated in a city having less than one hundred thousand inhabitants, is the keeper of a public warehouse of class B, within the meaning of section 2 of the warehouse act: Rev. Stats. 1874, p. 820. It was also held that receipts for grain delivered to a public warehouseman by the owners evidence a bailment, and not a sale, whether the grain is kept separate or not.

The rule adopted in the cases cited may properly be applied here. We think it is plain that the proprietors of public warehouses, such as were kept by Harrington, do not become debtors of the owners of the grain stored, but, on the other hand, they are custodians, charged with the duty to restore, in quantity and quality, such grain as they may receive. This rule is demanded for the safety and security of those who intrust their grain to the keeping of persons engaged in the public business of warehousemen.

It is, however, claimed in the argument that instructions 7, 8, 10, and 11 given for the plaintiff authorized recovery in behalf of the plaintiff on the supposition that Harrington was doing

business as a private warehouseman. We do not so understand the instructions. No. 8 merely declares, in substance, that, if the jury believe ~~see~~ from the evidence that plaintiff was the owner of the property in question and entitled to the possession thereof at the time of the commencement of the suit, and that defendant was guilty of wrongfully detaining the same after demand, then the plaintiff was entitled to recover. No. 10, in substance, directed the jury that if they found from the evidence that the grain in question was the property of plaintiff and that he was entitled to the possession, and that the defendant levied upon and took possession under an execution against Harrington, and that he had sold the property without the consent of plaintiff, this would amount to a conversion, and plaintiff would be entitled to recover. The eleventh declared, in substance, that although the jury might believe, from the evidence, that the sheriff lawfully came into the possession of the property, yet if they find that plaintiff was the owner and entitled to the possession, and before the commencement of the suit made a demand for the possession of the property and defendant refused to deliver the same, but afterward sold the property, this would amount to a conversion. As to the three instructions, we fail to see wherein they lay down an incorrect rule of law or one calculated to mislead the jury in arriving at a correct decision of the questions submitted for their determination.

As to the seventh instruction, the jury were, in substance, directed that if they believed from the evidence that plaintiff delivered in the warehouses of Harrington certain grain described in the declaration, and that the grain was delivered under an agreement between plaintiff and Harrington that the grain was to be held by Harrington upon storage as in a public warehouse, or, if said warehouses were not public warehouses, then that the agreement was that the ownership of the said grain should remain in plaintiff and should be subject to his order and control until such time as he should see fit to sell, "and that at the time of the levy of the execution ~~see~~ by the defendant said Harrington had on hand in said warehouses said grain, or grain of like character and grade equal to or exceeding the amount of grain delivered by the plaintiff, which said Harrington was holding for said plaintiff under said agreement, and that said defendant levied upon and took said grain upon an execution in favor of the First National Bank of Marseilles and against said Harrington, and sold or otherwise disposed of

the same so as to deprive the plaintiff of the same without the consent of the plaintiff, then the jury should find for the plaintiff."

While we do not regard this instruction as a model, we do not regard it liable to the objection urged against it. The first part of the instruction relates to public warehouses, and no fault is found with that portion of it; but that part of the instruction after the word "or," it is claimed, authorizes a recovery, although the grain of the plaintiff was stored in private warehouses. This, as we think, is a misapprehension of the terms of the instruction. The instruction, as we understand it, predicates the right of recovery on the theory that there was a contract between the parties under which the grain was stored, and under which the ownership of the grain should remain in plaintiff and be subject to his order and control, and at the time of the levy Harrington had on hand plaintiff's grain which he was holding for the plaintiff. If grain was placed in the warehouse under a contract that it was to be held for the plaintiff, subject to his order and control, and it was so held, it could make no difference what kind of a warehouse it was in. As no title could pass under such an arrangement, a creditor of Harrington would have no right to seize and sell the property for Harrington's debts.

We find no substantial error in the record, and the judgment of the appellate court will be affirmed.

WAREHOUSEMEN—TITLE TO GRAIN STORED.—The delivery of grain for storage in a warehouse is a bailment, under the Minnesota statute, and the title thereto remains in the depositor, who is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain that he deposited may have been removed, and other grain of like kind and quality substituted in its stead: *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. Rep. 209.

CONVERSION—SALE OF GRAIN BY WAREHOUSEMAN.—If a warehouseman sells as his own grain beyond the amount of the excess above that necessary to meet his outstanding receipts, without express consent of the depositors in his warehouse, his sale passes no title, and the owner may follow the grain into the hands of the purchaser, and recover of him for a conversion: *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. Rep. 209.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

PRESCOTT v. HIXON.

[22 INDIANA APPEALS, 189.]

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDIVIDUAL SIGNER OF CORPORATE NOTE.—If a note is signed by an individual maker with such words as "president," "manager," or "secretary," immediately following the name, they are, in the absence of a corporate seal, or an apparent intention in the body of the instrument to bind the corporation alone, considered as merely descriptive of the person of the maker, and the note must be held to be the obligation of the person signing it.

NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE TO VARY.—If a note is clear and unambiguous in its terms and certain in its legal effect, parol evidence is not admissible to change or vary it. It is immaterial what the parties to the note believed as to the legal effect of the form in which they contracted.

MISTAKE—REFORMATION OF INSTRUMENTS.—A court of equity may reform a note, if, in the execution thereof, the word "for," by the mutual mistake of the parties, was omitted after the signature of the president of the corporation for which the note was made.

E. E. Baker, C. W. Miller, and State & Chamberlain, for the appellants.

W. J. Davis and Deahl & Deahl, for the appellee.

140 **HENLEY, J.** Action by appellee Hixon against appellants Prescott and Cordrey, as sole defendants, upon a note, which was in words and figures as follows:

"\$1,064.26. Middlebury, Ind., Aug. 31, 1893.

"Thirty days from date I promise to pay to the order of Henry W. Hixon one thousand and sixty-four and 26-100 dol-

lars, negotiable and payable at Farmers' Bank, with interest at the rate of 8 per cent semi-annually until this note is paid—the interest payable semi-annually—and attorneys' fees. Value received. Without any relief whatever from valuation and appraisal laws. The drawers and indorsers, sureties, and guarantors severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note. The receipt of the interest in advance shall not release or discharge any indorsers, surety, or guarantor on this note.

“(Signed) O. O. PRESCOTT,

“Pres. Mid. B. & Cheese Co.

“M. A. CORDREY,

“Sec. Cr. & Cheese Co.

“Indorsements: Guaranty of Directors: Signed Jacob Pleiffer, Director M. B. C. Co.; George W. Roth, Director M. B. C. Co.; Christ. S. Messner, Director M. B. C. Co.; Frederick Pleiffer, Director M. B. C. Co.; Samuel J. Miller, Director M. B. C. Co. August 31, 1894, received interest for 1 year, \$85.13. August 31, 1895, received interest for 1 year, \$85.15.”

To the complaint upon the above note each of said appellants filed his separate answer in one paragraph, and each appellant also filed his separate cross-complaint in one paragraph ¹⁴¹ against appellees Hixon and the Middlebury Butter and Cheese Company. The demurrer of the appellee Hixon to the separate answers of appellants was sustained. The demurrer of appellee Hixon to the separate cross-complaints of appellants was also sustained. The demurrer of the appellee the Middlebury Butter & Cheese Company to the separate cross-complaints of appellants was sustained. Appellants refused to plead further, and judgment was rendered against them. The separate answers and cross-complaints filed by appellants are identical. The facts relied upon are briefly stated in the answer, which, omitting the formal parts, is as follows: “The defendant Oramel O. Prescott, for amended separate answer to the plaintiff's complaint herein, alleges that the Middlebury Butter and Cheese Company was duly organized as a corporation under the laws of Indiana in November, 1891, and ever since has been, and now is, such corporation; that said corporation provided by its by-laws that the officers of said corporation should consist of a president, vice-president, secretary, and treasurer, and board of five directors elected annually by the stockholders of the company; that it should be the duty of the president to preside at all meetings of the stockholders and directors, and sign

all stock certificates issued by the company, and order special meetings of the stockholders called whenever, in his judgment, the interest of the company should demand it; that the vice-president should perform, in the absence of the president, all the duties of the president; that it should be the duty of the secretary to keep a record of all meetings of the stockholders and directors, take care of all correspondence, and account for all purchases and sales, and turn over to the treasurer all moneys received, taking his receipt for the same, and issue notices for meetings as required; that the treasurer should receive all money from the secretary, and receipt for the same, and pay it out on order of the secretary and signed by the chairman of the board of directors; that the board of directors should have charge of the financial interests ¹⁴² of the company, and have general management of the business, a majority of whom should constitute a quorum to do business; that said corporation from the time of its incorporation to the present time followed out the requirements of said by-laws, by electing a president, a vice-president, a secretary and a treasurer, and, in addition thereto, a board of five directors, and said officers performed the duties prescribed by said by-laws, and said board of directors managed and directed the finances and business of the company; that at the time of the execution of the note sued on in this action, and for one year prior thereto, the defendant Prescott was the president of said corporation, the defendant Cordrey was the secretary of said corporation, the plaintiff Hixon was the treasurer of said corporation, and Jacob Pleiffer, George W. Roth, Christian S. Messner, Frederick Pleiffer, and Samuel J. Miller were the directors of said corporation; that for at least six or eight months prior to the time of the execution of the note sued on in this action the plaintiff Hixon had paid out for milk and other materials bought and used by said corporation sums of money in advance of the receipt by him, as treasurer, of money from the sale of butter and cheese, and other products of the company, with which to pay for the material and operating expenses of said company, whereby the said company would be indebted to the said Hixon from time to time; that at least six months prior to the execution of the note sued on in this action the said Hixon and the said directors agreed that the said Hixon should have eight per cent interest upon the money so advanced by him in paying the milk bills and other bills of the company, and that the directors, on behalf of the corporation, should have monthly settlements with the said Hixon

for the purpose of determining the balance, if any, due to the said Hixon, and the amount of money he should advance in the coming month in anticipation of the receipts of the company from the sales of its products, and that the company's note should be given plaintiff therefor; ¹⁴³ that for at least six months prior to the execution of the note sued on in this action the said president and secretary of said corporation signed notes of the same tenor and effect, and signed in the same way as the note sued on in this action, and all of said notes were surrendered by the said Hixon upon an accounting had between him and the directors of said company of the amount of money received by him from the sales of the products of the company, and an accounting of the money advanced and to be advanced for the next month by Hixon for the expenses of the company, and upon a new note of the same tenor and signed in the same way as the note surrendered being executed and delivered to him; that this defendant received no part of the consideration of the note sued upon in this action, but that the entire consideration was received by the said corporation; that this defendant received no part of the consideration of the various said notes of the same tenor and method of signature prior to the note now in suit, but that the entire consideration of said notes was received by the said corporation; that the note now in suit was not, and is not, the individual note of this defendant, nor the joint note of himself and his codefendant, nor the joint note of himself and his codefendant and the said corporation, but that the said note was and is the note of the said corporation alone; that the letters following the name of this defendant in the signature to said note are abbreviations for and were understood by the parties to mean 'President Middlebury Butter and Cheese Company'; that the said plaintiff, Hixon, was present at the various meetings of the board of directors, at which settlements were made of his accounts, as treasurer, between himself and the board of directors, and he knew at the time of the execution of the note in suit, and at the time of the execution of the preceding notes, as above stated, that this defendant was acting, and this defendant was in fact acting, on behalf of said corporation, and not otherwise, in the execution of the said various notes, including the note in suit; that the payments of interest indorsed on said note were ¹⁴⁴ paid to the plaintiff by said corporation, and no part thereof by this defendant or any other person, and plaintiff received each

of said notes, including the note in suit, as the sole note of said corporation, and not otherwise."

The cross-complaints filed by appellants state the same facts with the additional averments: "That by the mutual oversight and mistake of the plaintiff and defendant, this defendant failed and omitted to insert the word 'for' after the word 'president' in his signature, so that the signature of this defendant was written upon said note as the same now appears thereon, instead of being written O. O. Prescott, president for the Middlebury Butter and Cheese Company, as was intended by the parties; that the payments of interest indorsed on said note were paid to the plaintiff by said corporation, and no part thereof by this defendant, or any other person, and plaintiff received said notes, including the note in suit, as the sole note of said corporation and not otherwise." The prayer of the cross-complaint is, that the note be reformed by writing the word "for" after the word "president" in his signature to the note. The action of the lower court in sustaining appellees' demurrer to the separate answers and cross-complaints of appellants are the alleged errors assigned and argued in this court by appellants' counsel.

It is the settled law of this state that where a note is signed by an individual maker with such words as "trustee," "president," "manager," "secretary," immediately following the name, such words are, in the absence of a corporate seal upon the note, or an apparent intention in the body of the instrument to bind the corporation alone, considered as merely descriptive of the person of the maker, and the note is held to be the obligation of the person so signing it: *Hays v. Crutcher*, 54 Ind. 260; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *McClellan v. Robe*, 93 Ind. 298; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Swarts v. Cohen*, 11 Ind. App. 20. *Tiedeman*, in his work on Commercial Paper, section 123, page 200, says: "Where the name of the corporation ¹⁴⁵ does not appear either in the body of the instrument or in the signature, and the only evidence on the face of the instrument that the person signing does not intend to bind himself personally is the affix to his signature of some designation of agency, as where he signs "A, treasurer, president, or agent," without stating for whom or for what company he is acting, the authorities are unanimous in declaring that the instrument creates a personal liability upon the person whose name appears on the paper." At page 201, the same writer says: "And the same rule is followed where the

official title and name of the corporation are affixed to the signature; for example, 'A B, President of the Henderson Loan Co.'"

The foregoing statement of the rule is in accord with our view of the law as it exists in this state. The language of Morris, C., in the case of Williams v. Second Nat. Bank, 83 Ind. 237, seems to settle this case as to the sufficiency of the answer. In that case it is said: "The note upon its face purports to be the note of the appellants, and not the note of said lodge, the words 'Trustees Perry Lodge No. 37, F. & A. M.,' being descriptive of the persons of the appellants merely. Whether the manner and form of executing the note adopted by the appellants were the proper manner and form of executing the note of the lodge was a question of law which the parties will be conclusively presumed to have known. Knowing the law, they must be held to have known that the note, in the form in which it was executed, purported to be the note of the appellants, and not the note of the lodge. What the parties in fact understood, supposed, or believed as to the legal effect and meaning of the form in which they contracted is immaterial. The intention which the law imputes to their contract must, in the absence of fraud or mistake of fact, be held to be the intention of the parties. They cannot avoid the contract by averring an intention or purpose opposed to that which the law attaches to ¹⁴⁶ their agreement." Under the law of this state, the note in the case at bar being clear and unambiguous in its terms is certain in its legal effect, and parol evidence is not admissible to change or vary it, and it is immaterial what the parties to the note believed as to the legal effect of the form in which they contracted. The demurrer to the separate answers of appellants was properly sustained.

The cross-complaints present an entirely different question. Courts of equity will reform written instruments in all cases where the mistake is material, and is in the execution of such written instrument, but the courts cannot, except in rare cases, grant relief where the mistake was one of law, as when the legal effect of the language used differs from the intention of the parties at the time it was so written and signed. It is said in the case of Swarts v. Cohen, 11 Ind. App. 20: "Courts of equity will sometimes relieve against mistakes of law and will reform a written instrument so as to make it conform to or speak the intention of the parties. This is particularly true when words are used to express a contract previously made": See Citizens

Nat. Bank v. Judy, 146 Ind. 322, and cases there cited. But in this cause it is not asked in the cross-complaint that the court relieve appellants from a mistake of law. The relief demanded is that a mistake of fact be corrected, the mutual mistake of all the parties in omitting a certain word from the signature to the note. No reason is given, and we think no good reason could be given, why the relief demanded in the prayer of the cross-complaint of each of appellants could not be granted by a court of equity upon the introduction of sufficient evidence to warrant it.

The judgment of the lower court is reversed, with instructions to overrule the demurrer of the appellee Hixon to the cross-complaint of Oramel O. Prescott, to overrule the demurrer of the Middlebury Butter and Cheese Company to the cross-complaint of said Prescott, and to overrule the separate ¹⁴⁷ demurrers of said Hixon and the Middlebury Butter and Cheese Company to the cross-complaint of appellant Moses A. Cordrey.

Black, C. J., dissents.

Wiley, J., absent.

NEGOTIABLE INSTRUMENTS—LIABILITY OF—INDIVIDUAL SIGNER OF CORPORATE NOTE.—Where a bill of exchange was signed "Chas. F. Hale, Prest.," the addition of the word "Prest." was held not to shift the responsibility from him to a company of which he was president, so far as the holder was concerned: *Note to Albany etc. Co. v. Merchants' Nat. Bank*, 60 Am. St. Rep. 182. That the signing of a note by an officer of a corporation, to which name is affixed his official corporate title, creates an ambiguity, and evidence is admissible to establish the real maker, see *Reeve v. First Nat. Bank*, 54 N. J. L. 208. 33 Am. St. Rep. 675.

NEGOTIABLE INSTRUMENTS.—PAROL EVIDENCE is inadmissible to change or modify a note, full and complete on its face, where no fraud or mistake is imputed: *Cook v. Brown*, 62 Mich. 473, 4 Am. St. Rep. 870.

MISTAKE—REFORMATION OF INSTRUMENT.—A mistake as to the construction or legal effect of a written agreement between two parties does not justify its reformation unless the mistake is mutual: *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, and monographic note thereto on the reformation of contracts. That a note cannot be reformed where it was written as intended, though words were omitted by a mistake as to the legal effect of the omission, see the monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 520.

HOAGLAND v. STATE.

[22 INDIANA APPEALS, 204.]

ESCAPE—RIGHT OF OFFICER TO RETAKE PRISONER UNDER EXECUTION.—If a prisoner, permitted by the sheriff to be at large escapes, the escape is voluntary in legal contemplation. The sheriff, after such escape from custody under final process, cannot retake the prisoner or receive him back without the plaintiff's consent.

OFFICERS—LIABILITY FOR ESCAPE OF PRISONER UNDER FINAL PROCESS.—If a sheriff voluntarily permits a prisoner to escape under execution in a bastardy prosecution, the return of the prisoner to custody or his rearrest without the consent of the judgment plaintiff does not relieve the sheriff from liability for the escape.

OFFICERS—LIABILITY FOR ESCAPE OF PRISONER UNDER EXECUTION.—In an action against a sheriff to recover for voluntarily permitting a defendant under execution in a bastardy proceeding to escape, the insolvency of such defendant, or his inability to pay or replevy the judgment against him, does not reduce the damages against the officer.

OFFICERS—LIABILITY FOR ESCAPE OF PRISONER UNDER EXECUTION—JUDGMENT PAYABLE IN INSTALLMENTS.—If a judgment against a defendant in a bastardy proceeding is payable in annual installments, a judgment against the sheriff for voluntarily permitting such defendant to escape while under execution should be for the same amount, payable in the same manner, as the original judgment.

OFFICERS—LIABILITY FOR PERMITTING DEFENDANT UNDER EXECUTION TO ESCAPE.—A sheriff who voluntarily permits a defendant under execution in a bastardy proceeding to escape is not required to pay the judgment at the hazard of being committed to jail like the principal defendant.

J. Overmeyer, F. E. Little, and Vanosdol & Francisco, for the appellant.

C. A. Korbly and W. O. Ford, for the appellee.

²⁰⁵ **GAVIN, J.** The appellee sued appellant for having voluntarily permitted the escape of a defendant committed to his charge upon a final judgment in a bastardy prosecution.

The questions presented arise upon the exceptions to the conclusions of law on a special finding and a motion to modify the judgment.

From the facts found it appears that the appellee's judgment was duly rendered, and the defendant duly committed to the sheriff's care, and imprisoned by him in the proper jail, on account of his failure to pay or replevy the judgment as required by law.

On three different occasions the sheriff voluntarily permitted the prisoner to depart from the jail and to be and remain out of

his sight, custody, and control for several hours on each occasion; once to visit his mother, who was sick, at which time he also went to the barber-shop and got shaved, and also voted at the election; once to see his father, who was reported dying; and once to eat Thanksgiving dinner at home. From each of these excursions the prisoner voluntarily returned to the jail, and was again locked up as had been expected and intended by the sheriff. On December 7, 1892, the prisoner was, as had been usual, assisting the sheriff and jailer in carrying ashes out of the jail. While he was in the jail and courtyard about sixty feet from the jail, both the jailer and deputy sheriff in charge went down into the cellar, leaving the prisoner in the courtyard, out of their sight and control. During their absence, and without their knowledge, consent, or expectation, he climbed the fence and ran away, and remained at large until May, 1894, when, after the commencement of this suit, he was rearrested without any process, and voluntarily returned to ²⁰⁸ the jail, where he remained until the time of trial in the custody of appellant's successor.

All these absences from the jail were without the prior knowledge or consent of the relatrix, who never at any time consented to or ratified any reimprisonment. The prisoner was destitute of property, and unable to pay or replevy the judgment.

Under these facts, we are satisfied that, upon well-settled principles, the escape was, in contemplation of law, voluntarily permitted, and not merely negligently allowed. The fact that the sheriff did not intend that the prisoner should permanently depart from his control, or that he expected him to return to his custody, or remain where he could again assume control of him, cannot excuse his knowingly and intentionally permitting him to go outside the jail, and outside of his sight and control.

The law is settled by both ancient and modern authorities that when the sheriff thus permits a prisoner to be at large there is a voluntary escape in legal contemplation; nor can the sheriff, after such an escape from custody under final process, retake the prisoner, or receive him back, without the judgment plaintiff's consent: *Spader v. Frost*, 4 Blackf. 190; *Riley v. Whittiker*, 49 N. H. 145, 6 Am. St. Rep. 474; *Thompson v. Lockwood*, 15 Johns. 256; *Adams v. Turrentine*, 8 Ired. 147; *Lansing v. Fleet*, 2 Johns. Cas. 3, 1 Am. Dec. 142; *Hopkinson v. Leeds*, 78 Pa. St. 396; *Stickle v. Reed*, 23 Hun, 417; *Richardson v. Rittenhouse*, 40 N. J. L. 230; *Doane v. Baker*, 6 Allen, 260; *Murfree*

on Sheriffs, sec. 190; Mechem on Public Offices, sec. 759; 2 Freeman on Executions, sec. 461.

The cases of *Meehan v. State*, 46 N. J. L. 355, and *Wheeler v. State*, 39 Kan. 163, are not sufficient to sustain any different doctrine. In the former, it is indeed declared that to constitute a voluntary escape it must be allowed cum malo animo, but this is said with reference to a case where the sheriff discharged the prisoner in good faith, under an order of court, believing it to be valid. In the latter ²⁰⁷ case, the prisoner was all the time accompanied by an officer. In both radically different principles control from those which should govern the one in hand, where the sheriff voluntarily permitted the prisoner to go out of the jail and out of his sight and control, not trusting to his own power of keeping him, but leaving it to the prisoner's honor and volition to return to or remain in custody.

There are some emergencies which have been declared a sufficient excuse for a prisoner's temporary liberty, but we have not to deal with these in this instance. It has also been adjudged that when there has been a voluntary escape from final process, and suit brought by the execution plaintiff against the sheriff for such escape, the plaintiff cannot require the recapture of the prisoner, nor is the sheriff permitted to rearrest him until he has paid the judgment: *Ex parte Voltz*, 37 Ind. 175, 10 Am. Rep. 86; *Ex parte Voltz*, 37 Ind. 237; *McElroy v. Mancius*, 13 Johns. 121; *Littlefield v. Brown*, 1 Wend. 398.

In any view which we may, under the circumstances of this case, take of the law, the return of the prisoner to custody, or his rearrest, without the consent of relatrix, did not relieve the sheriff from responding for the escape. The defendant has, under the authorities, been in jail since his return, not by virtue of the power of the law, but of his own volition.

It is abundantly established by authority that there is a broad distinction as to the results flowing from escapes from mesne and from final process: Mechem on Public Offices, sec. 759; Gwynne on Sheriffs, 410; Murfree on Sheriffs, sec. 196; *Richardson v. Rittenhouse*, 40 N. J. L. 230; *Atkesson v. Matteson*, 2 Term Rep. 172.

The doctrine that, as a general rule, the sheriff may retake a prisoner escaped from mesne process, but cannot retake one voluntarily permitted to escape from final process, seems to be recognized by appellant's counsel; but the position assumed by

some of them seems to be that, by the authority of *Lakin v. State*, 89 Ind. 68, the distinction between ²⁰⁸ escapes from mesne and final process has, in bastardy prosecutions, been overthrown; that by *State v. Newcomer*, 109 Ind. 243, and *State v. Caldwell*, 115 Ind. 6, it has been determined that where the escape has been from the mesne process in such prosecutions, the defendant may rightly be rearrested, and held under the judgment rendered in his absence, and that such arrest may be pleaded by the sheriff as to all except costs and attorney's fees. Therefore they argue, there being no difference in the rules of law applicable to the escapes from the two classes of process, the rearrest, being pleadable in the one, may also be set up in the other. The decision in the *Lakin* case, however, cannot be regarded as going so far as is claimed by counsel. Therefore, the premise failing, the conclusion also must fail.

It is true the learned judge does there say that he can see no distinction, on principle, between the two classes of arrest; but the tendency and general drift of his argument is not toward placing them upon an equality, by reducing the stringency of the law as applied to escapes from final process, but by raising the standard of the sheriff's duty as to prisoners held under mesne process. In the final determination of the cause, however, the court expressly refuses to decide that the same rule governs in escapes from both mesne and final process. In the cases in 109 Indiana and 115 Indiana, the supreme court does not, by reason of the authority of *Lucas v. Hawkins*, 102 Ind. 64, which is based upon the peculiar provisions of our statute (Rev. Stats. 1881, sec. 986; Burns' Rev. Stats. 1894, sec. 998), carry out the reasoning of the court in the *Lakin* case, and it fails to apply to an escape from mesne process the rule governing where the escape is from final process. These two cases holding that a rearrest may lawfully follow after judgment, where the escape was from custody under mesne process, will not authorize us to overthrow the thoroughly established and well-recognized law that plaintiff's right of action for the debt, by reason of the defendant's escape from final process, voluntarily permitted, ²⁰⁹ cannot be affected by the subsequent return of the prisoner without her consent.

This action is to enforce the statutory liability given by the statute of 2 Westminster, chapter 11 (13 Edward I), and 1 Richard II, chapter 12, as adjudged by repeated decisions of our supreme court, and which these decisions declare to be in force

in Indiana. The insolvency of the defendant, or his inability to pay or replevy the judgment, does not reduce the damages recoverable by the plaintiff, which are the entire debt: *Gwinn v. Hubbard*, 3 Blackf. 14; *Hall v. Johnson*, 3 Blackf. 363; *State v. Johnson*, 1 Ind. 158; *State v. Hamilton*, 33 Ind. 502; *State v. Mullen*, 50 Ind. 598; *Lakin v. State*, 89 Ind. 68.

In *State v. Newcomer*, 109 Ind. 243, the learned judge seems to have understood that, by the *Hamilton* and other cases, it is decided that, in actions on the official bond, the sheriff is liable as in debt under these statutes. A careful examination of these authorities will disclose, we think, that they do not so adjudge. They simply assert that in actions against the sheriff, individually, he could be held liable under the statutes, while in *State v. Johnson*, 1 Ind. 158, it was explicitly decided that, in actions on the bond, the liability was not as in debt under the statutes, but as on the case at common law. In some respects, the remedies afforded by resort to the common law and statute liabilities are different, although probably not materially so where the escape has been voluntarily permitted. Notwithstanding the antiquity of these statutes, and their obsolescence in many respects, as applied to our institutions and present civilization, we cannot refuse in appropriate cases to apply them, nor reject the construction placed thereon by the courts of England, and by our own supreme court at an early day, and subsequently approved in so many decisions.

The statute upon which appellant seems to rely does not, in our judgment, afford him any relief, or support his position. ²¹⁰ By its terms the right of reducing the damages by recapture was limited to violent escapes and to recaptures made within three months from such escape. Manifestly, this could not be made to include a recapture made after a voluntary escape, and more than a year subsequent to the escape. The fact that the enactments of our own legislature have somewhat modified the rigor of the law as formerly declared, but have not interfered with other well-recognized rules, would indicate that it was expected these latter would continue to be enforced.

The judgment in the bastardy proceeding was for five hundred dollars, payable in annual installments. The judgment in this action was for five hundred dollars and costs, payable absolutely and in praesenti. To this we are of opinion the appellee was not entitled. No rule of law or equity requires the sheriff to do more than answer for the original judgment. He

should have the same benefit from the installments as the judgment defendant. Moreover, there is an additional reason why the sheriff should not be held absolutely bound for the instant payment of the entire sum. By statute, in the event of the death of the child, the court may make a proper reduction from those sums not yet matured. This is a right of which the sheriff should not be deprived. The sheriff is not, as suggested by counsel, to be called on to pay or replevy at the hazard of being committed to jail like the principal defendant. It is sufficient answer to this proposition to say that the law does not so provide.

The judgment is therefore reversed at appellee's costs, with instructions to the trial court to render judgment in appellee's favor for the amount of the original debt, with interest on matured installments from the time of the finding, giving the appellant the benefit of the installment provisions contained in the original judgment, and with the further provision that a satisfaction of the original judgment shall operate as a satisfaction of the one rendered herein, save as to costs.

311 ON MOTION TO MODIFY MANDATE.

GAVIN, C. J. Upon further consideration the mandate in this cause is modified so as to read as follows: The judgment is therefore reversed in part, as hereinafter specified, at appellee's cost, with instructions to the trial court to sustain appellant's motion, filed in the court below, to modify the judgment in appellee's favor, so that the appellant shall have the benefit of the installment provisions contained in the original judgment, and that the said several installments shall bear interest from the time of their maturity, respectively, until paid, and to further order that a satisfaction of the original judgment shall operate as a satisfaction of the one rendered herein, save as to costs. And, with the exception of the modification herein ordered, the judgment below is affirmed.

ESCAPE—RIGHT OF OFFICER TO RETAKE PRISONER.—Where a defendant is taken in execution, and the sheriff allows the prisoner voluntarily to escape, he cannot afterward lawfully retake or detain him without a new authority from the plaintiff, but he can lawfully retake or detain the prisoner after a negligent escape: *Lansing v. Fleet*, 2 Johns. Cas. 8, 1 Am. Dec. 142.

ESCAPE—LIABILITY OF SHERIFF.—When the prisoner is voluntarily permitted to escape, his voluntary return and assent to custody will not prevent the liability of the sheriff for the escape: *Lansing v. Fleet*, 2 Johns. Cas. 8, 1 Am. Dec. 142.

OFFICERS—LIABILITY FOR ESCAPE—DAMAGES.—In an action against a sheriff for an escape on mesne process, the plaintiff

can only recover damages for what he has lost by the escape, and the jury may find such damages as they may think the plaintiff has sustained under all circumstances: *Russell v. Turner*, 7 Johns. 189, 5 Am. Dec. 254; *Blanding v. Rogers*, 2 Brev. 394, 4 Am. Dec. 595. In debt for an escape of an execution debtor, the sheriff is liable for the whole debt and costs, but in case the damages are in the discretion of the jury: *Duncan v. Klinefelter*, 5 Watts, 141, 30 Am. Dec. 295.

MURPHY v. BUSICK.

[22 INDIANA APPEALS, 247.]

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS.—An executor is required to answer in a county to which he has removed since judgment was obtained against him, in proceedings supplementary to execution, issued by the court of another county, as to funds in his hands belonging to a legatee who is the judgment debtor.

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS—PLEADINGS.—A complaint in supplementary proceedings to reach a legacy of the judgment debtor in the hands of an executor is not bad for failing to allege that the estate is solvent, and that a year has elapsed since the issuance of letters of administration. These facts are matters of defense.

M. W. Hopkins and R. T. MacFall, for the appellants.

O. H. Bogue, for the appellees.

247 COMSTOCK, J. Appellants instituted proceedings supplementary to execution, under sections 828-831 of Burns' Revised Statutes of 1894 (*Horner's Rev. Stats.* 1897, secs. 816-819), against appellee Allen G. Busick and his codefendants and appellees, Oliver H. Bogue, James I. Robertson, and Kate M. Busick, executors of the last will of Joseph Busick, late of Wabash county, Indiana, deceased. The court sustained the demurrer of the executors, and, appellants refusing to plead further, judgment was rendered against them. The only error assigned is the sustaining of the demurrer.

The complaint alleges that appellants are the owners of a judgment against Allen G. Busick for three hundred and seven dollars and thirty-two cents; that appellee Busick lived in Wabash county at the time the judgment was rendered; that execution was issued to the sheriff of **248** Wabash county, and returned "No property found"; that Busick afterward removed to and resided in Pulaski county; that appellants had execution issued to the sheriff of Pulaski county, and that it is now in his hands unsatisfied, and that Busick has no property upon which it may be levied; that the judgment is unpaid, and not appealed from, and that Busick has certain personal property, rights, and credits which he unjustly refuses to apply to the

payment of the same, to wit, a certain bequest of one thousand dollars made by Joseph Busick, the testator of appellees Bogue, Robertson, and Kate W. Busick, by item 14 of his last will, which reads as follows: "I hereby will and devise to Allen G. Busick of Winamac, Indiana, the sum of one thousand dollars (\$1,000), and direct my executors to pay the sum to him in cash as one of my obligations"; that said executors have said sum of one thousand dollars in their possession and control; that it is of the value of one thousand dollars, and that said bequest, together with other property of Allen G. Busick, exceeds the amount exempt from execution. The prayer is for an order requiring appellees to answer concerning said bequest, and that it be paid to the clerk of the court to be applied upon the judgment of appellants. The judgment defendant appeared and answered, but made no defense, and the court found in favor of appellants against him, and adjudged that he be prohibited from selling, assigning, or transferring his interest in said bequest.

As stated by appellants in their brief, two questions are presented for the determination of the court: "1. Can an executor be required to answer in proceedings supplementary to execution as to funds in his charge belonging to a legatee? 2. If an executor can be required so to answer, can an executor appointed by and acting under the direction of the Wabash circuit court be called upon to answer in the Pulaski circuit court?" We are of the opinion that both of these questions must be answered in the affirmative. In matters connected with the administration of an estate requiring ²⁴⁹ the instructions and direction of the court, an executor is under the exclusive jurisdiction of, and answerable only to, the court whose officer he is, and to which he reports; but, when the settlement of the estate cannot be delayed or interfered with by the action of another court, the reason ceases for denying such other court jurisdiction. The complaint before us does not seek to interfere with the administration of the estate, but asks that money be paid to the appellants instead of Allen G. Busick. In support of the first proposition, we cite *Lawrence v. Pease*, 66 Hun, 633, 21 N. Y. Supp. 223; *Bacon v. Bonham*, 27 N. J. Eq. 209; *Hardenburg v. Blair*, 30 N. J. Eq. 42, 64; *Wells v. Ely*, 11 N. J. Eq. 172; *Lynch v. Utica Ins. Co.*, 18 Wend. 236; *Hallett v. Thompson*, 5 Paige, 583; *McArthur v. Hoysradt*, 11 Paige, 495; *Ross v. Clussman*, 3 Sand. 676; *Havens v. Healy*, 15 Barb. 296; *Rand v. Rand*, 78 N. C. 12; *Spencer v. Greene*, 17 R. I. 727.

We are not advised that the second question has been directly passed upon by the supreme court of this state. We are not, however, without decisions in point by other courts. In *Spencer v. Greene*, 17 R. I. 727, an estate was in the hands of executors in process of settlement. Greene was one of the legatees. Proceedings supplementary to execution were had in the state of New Jersey, and by a judgment of the New Jersey court "all the real estate, property, equitable interests, things in action, and effects to him (Greene) belonging on the first day of July, 1887, wherever situated, except those exempt from execution by statute," were assigned by operation of law to one Keily to apply upon a judgment. A contest arose as to the right to the interest of Greene, and the complainant (an executor) brought a proceeding for instructions in regard to the payment of funds in his hands. The court directed the payment to be made to Keily. The court said: "The only uncertainty was the time when they would be entitled to receive it. But the fact that a legatee may die before the time of payment does not prevent the ²⁵⁰ legacy from vesting, any more than in an ordinary case when a legacy is payable at the end of a year from the death of the testator. Futurity is not annexed to the substance of the gift, but only to the time of payment. It was a present right to a future enjoyment."

In *Union Bank v. Northrop*, 19 S. C. 473, money owing by a corporation to an execution debtor had been turned over to the master of the court by the receiver of the corporation. The order for the application of the money was made by a court other than the one in which the receivership was being administered, and other than the one in which the master acted. The court ordered the money in the hands of the master belonging to the defendant applied to the satisfaction of the judgment. To this order the execution debtor excepted, stating reasons therefor. The second reason stated is: "2. Because his honor, W. W. Wallace, had no jurisdiction of the subject matter of this action, it being in the custody of the court, and otherwise exempt from process." The court said: "It is said that the money, being in the hands of the master, is in custody of the court itself, and could not be reached by these proceedings. This money was in the hands of James Connor, receiver of the Greenville & Columbia Railroad Company, who owed it to the defendant, Northrop, and in whose favor it had been adjudged. When the receiver was discharged, pending the litigation, the money was deposited with the master as matter of convenience,

and, for the purposes of this case, must be considered as still in the hands of the receiver as a debtor of Northrop. There is no attachment here seeking a lien, but the question is simply as to the proper application of the money under supplementary proceedings. We think it a mistake to suppose that the money is in *custodia legis* in such sense as not to be subject to the order of the court." The foregoing cases are not cited as binding authority, but as instructive upon the question, and are approved by this court.

Having concluded that the action will lie, and that the ²⁵¹ Pulaski circuit court had jurisdiction, the remaining question to be determined is whether the complaint states a cause of action. Counsel for appellees urge as a reason for the insufficiency of the complaint several facts which would properly be matters of defense, but which do not appear in the complaint. Among other reasons thus urged, it is pointed out that the complaint does not state facts showing that a year has elapsed since the issuance of letters testamentary, nor that the estate is solvent, and that it does not, therefore, appear that the execution debtor has any claim upon the legacy. It is true that no final distribution nor final settlement of a decedent's estate can be made until after the expiration of one year from the issuance of letters testamentary or of administration: *Fleece v. Jones*, 71 Ind. 340, and cases there cited. It is also true that legacies are subject to the debts of the estate, and for this reason an executor is entitled to their possession. But these facts are matters of defense. Section 819 of Horner's Revised Statutes of 1897 reads: "After the issuing or return of an execution against the property of the judgment debtor, or any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in any amount, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law, such person, corporation, or any member thereof, may be required to appear and answer concerning the same, as above provided." The averments of the complaint comply with the requirements of the statute, and are sufficient to put appellees upon answer. Whether appellants are entitled to the application of the legacy, or any part of it, to the payment of their judgment, and the time when entitled to such application, must depend upon the facts proved on the final hearing as to the legacy and the condition of the estate. The judgment is reversed, with instruction to overrule appellees' demurrer to the complaint.

EXECUTIONS—SUPPLEMENTARY PROCEEDINGS.—Proceedings supplemental to execution should be instituted in the county where the judgment debtor resides or has a place of business. In North Carolina, the proceedings should be instituted in the county where the judgment was rendered, but the place where the defendant is required to appear and answer should be in the county of his residence: Monographic note to *Lathrop v. Clapp*, 100 Am. Dec. 504, on proceedings supplemental to execution. As to what facts must be shown, and in what manner they are shown in order to authorize this proceeding, see the monographic note to *Lathrop v. Clapp*, 100 Am. Dec. 504, 505.

BROWN v. SIMS.

[22 INDIANA APPEALS, 817.]

ABSTRACTS OF TITLE—LIABILITY OF ABTRACTER.—

An abstractor of titles employed by a landowner desiring to obtain a loan to make an abstract of the title to such property, who negligently fails to set out in such abstract an existing lis pendens, is liable therefor to the lender, who, before making the loan, informs such abstractor that he shall rely entirely upon his abstract, and is informed by the latter that he can so rely.

Claybaugh & Claybaugh, for the appellant.

Guenther & Clark and H. C. Sheridan, for the appellee.

S18 BLACK, C. J. By the complaint of the appellant against the appellee, a demurrer to which for want of sufficient facts was sustained, it was shown that one Henry H. Hackerd claimed to be the owner of real estate described, including a certain town lot described, in the town of Mulberry, Clinton county, Indiana, and, desiring to borrow of the appellant four hundred dollars, offered to mortgage said real estate to the appellant to secure the loan of said sum; that the appellant refused to make said loan until he was furnished with an abstract of title to said real estate; that said Hackerd applied to the appellee, who held himself out to be competent to make and certify abstracts of the title of lands in said county, and the appellee, for a valuable consideration, did make and deliver to the appellant, for the use of the appellant, an abstract of said real estate, and certified it to be a correct and true abstract of the title of said land, and did represent to the appellant, before he made said loan, that said title to said land was free and unencumbered, and that there were no liens of any kind whatever on said real estate; that the appellant informed the appellee that he would rely entirely upon said abstract and representations which he had made that said land was free from all judgments, mortgages, liens of every kind and description, before

he would loan said money to said Hackerd; that the appellee informed the appellant, before he made said loan, that he could rely on said representations and said abstract, that said land was free from all liens of every kind and character, that the title to said land was in Hackerd, and was perfectly good, and it was all right, and nothing against the land; that the appellant, relying upon said representations made by the appellee, and upon said abstract made by the appellee, and having no other knowledge or information whatever, and relying upon no other or different information, made said loan of four hundred dollars to said Hackerd ³¹⁹ on the eleventh day of June, 1895, and accepted a mortgage on said real estate, executed by said Henry H. Hackerd and Martha E. Hackerd, his wife, to secure said loan, and delivered to said Henry H. Hackerd said sum of four hundred dollars.

It was further alleged that the statement made in said abstract as to its being correct and true and the representations made by the appellee that said real estate was free and unencumbered, and that no liens whatever existed upon it, on which the appellant relied and parted with his money, were not true; that the appellee failed and neglected to set out in said abstract and to inform the appellant that there then existed a lien against a part of said real estate, in the nature of a *lis pendens* notice, which notice is set out, showing that certain persons named had filed their complaint in the court below against certain other persons named, including Henry H. Hackerd and Martha E. Hackerd, to set aside the conveyance of said town lot; said notice being signed by the plaintiffs in said suit by their attorney, and filed and recorded in the office of the clerk of said Clinton county on the twenty-second day of May, 1894, and signed by said clerk. It was further alleged that the Henry H. Hackerd so referred to was the same person of that name who borrowed said sum from the appellant, and that the lot mentioned in said *lis pendens* notice was part of the real estate embraced in said abstract, and the security which the said Hackerd offered and the appellant accepted for said loan; that said *lis pendens* notice was filed and recorded in the clerk's office of said county long prior to the making of said abstract by the appellee. It was further shown that the persons named as plaintiffs in said *lis pendens* notice obtained a judgment against the persons named as defendants therein in the cause referred to in said notice "in the sum of ——— dollars, which judgment was a lien on said real estate"; that an execution was issued by

the judgment plaintiffs against the judgment defendants, and said real estate was sold to satisfy said judgment; that the judgment plaintiffs being the highest and ³²⁰ best bidders, they purchased said real estate for the amount of their judgment, interest, and costs and attorney's fee, being the full value of said real estate.

It is further shown that said mortgage became subject to be foreclosed by failure of said Henry H. Hackerd to pay an interest note which became due on the 11th of June, 1896; that the appellant thereafter filed his complaint against said Hackerd and others to foreclose said mortgage; that the appellant therein obtained judgment for five hundred and thirty-one dollars and seventy-two cents, and a foreclosure of said mortgage; that it was therein further decreed that the appellant's judgment of foreclosure on said town lot was a lien junior to that of said plaintiffs named in said *lis pendens* notice; that on the 27th of February, 1897, all the real estate described in said mortgage was sold by the sheriff of said county, and the appellant, being the highest and best bidder, purchased the same for one hundred dollars, and paid costs amounting to forty-five dollars and fifty-two cents; that after said property was so sold to the appellant, he caused an execution to issue against Henry H. Hackerd, who filed his schedule claiming his exemption; that said Henry H. Hackerd is notoriously insolvent, and nothing whatever can be collected from him; that at the time said abstract and representations were made by the appellee, and said money was loaned by the appellant, said town lot was of the value of seven hundred dollars, and was ample security for said loan, had not said lien of said *lis pendens* existed against it; that the real estate described in said mortgage other than said town lot was not of the value of more than fifty dollars at the time of making said loan or since; "that by reason of the foregoing facts, and relying upon the abstract and representations so made by the defendant, as above set forth, and none other, and said representations not being true," the appellant "has lost all of said money so loaned, to wit, the sum of four hundred dollars and interest, and has been compelled to pay out for costs and expenses in said foreclosure proceedings the sum of one hundred dollars; wherefore," et cetera.

³²¹ One who holds himself out as an examiner of titles to real estate, and maker of abstracts thereof, impliedly undertakes that he possesses the requisite knowledge and skill for such employment, and, if he contract to render such service, he

is bound to exercise ordinary skill and care in making the examination and the abstract: *Chase v. Heaney*, 70 Ill. 268; *Lat-tin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115. Actionable negligence exists only when the party whose negligence occasions the loss owes a duty, arising from contract or otherwise, to the person sustaining the loss: *Kahl v. Love*, 37 N. J. L. 5. In *Zweigardt v. Birdseye*, 57 Mo. App. 462, it was held that where the abstract and certificate were made for the owner of the land, and not for one to whom he conveyed it, nor for such owner as agent of such grantee, the grantee, relying thereon, and suffering loss because of encumbrances not shown by the abstract, could not recover from the abstracter. It was said that the rule applies even where the abstracter has knowledge that the certificate as to title is to be used in a sale or loan to advise the purchaser or lender. In *Savings Bank v. Ward*, 100 U. S. 195, the attorney never came in contact with the lender or his agents, but made his report at the sole request of the claimant of the land, the borrower, there being no fraud or collusion. It was held that the lender could not recover from the attorney. It was said that where there is neither fraud nor collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty. In that case, the opinion of the majority being delivered by Mr. Justice Clifford, Mr. Chief Justice Waite dissented (*Swayne and Bradley, JJ.*, concurring with him), and said he thought if a lawyer employed to examine and certify to the recorded title of real property gives his client a certificate which he knows, or ought to know, is to be used by the client in some business transaction with another person as evidence of the ³²² facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find or record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found.

In *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, the plaintiff purchased land from Bowman, but declined to do so until furnished with an abstract. Bowman applied to the defendant to make an abstract, and paid for it. The defendant furnished the abstract to Bowman and guaranteed it to be a true and perfect abstract of title. The plaintiff purchased on the faith of it. The deed from Bowman to the plaintiff was prepared by the defendant. Certain conveyances of a part of the land were not shown by the abstract. The defend-

ant was held responsible to the plaintiff. The case is subjected to some criticism in the note thereto in *Dickle v. Abstract Co.*, 24 Am. St. Rep. 617, because, so far as appears from the opinion, the person in whose favor the action was brought did not apply to the searcher of records for the abstract of title, nor was he in any respect brought in any contract relation with him. An attorney who examined the title to real estate for the party by whom a loan was made secured by mortgage was held not responsible to an assignee of the mortgage: *Dundee etc. Co. v. Hughes*, 20 Fed. Rep. 39.

In *Talpey v. Wright*, 61 Ark. 275, 54 Am. St. Rep. 206, it was held that an abstracter employed by a landowner to prepare an abstract of title for the purpose of procuring a loan upon mortgage was not liable to an assignee of the notes secured by the mortgage, who took the notes in reliance upon the abstract, for loss occasioned by negligent omission of certain defects in the title from the abstract. In discussing the opinion of Mr. Justice Clifford in *Savings Bank v. Ward*, 100 U. S. 195, and the decision in *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 617, it is said that in the former case "the defendant did not know that the abstract was intended for the use and benefit of the plaintiff, nor the purpose for which it was to be used; he ³²³ did not contract to make an abstract for the information of the plaintiff"; while in the latter case, "the defendant not only made the abstract, but prepared the deed from the grantor to the purchaser, and we infer from the opinion that he knew the person for whose use and benefit it was wanted, and the purpose of it"; and it is said that, apart from the rather broad expressions of the judge who delivered the opinion in *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 617, "there does not seem to be any irreconcilable conflict in the points actually decided in the two cases."

In *Day v. Reynolds*, 23 Hun, 131, where it was held there was no liability, it was remarked that there was no reason, without proof of the fact, why the defendant, who made the search, should know that the mortgagor, or his agent who procured the making of the search, was to use it in a transaction with the plaintiff, the mortgagee, or with anyone else.

In *Mechanics' Bldg. Assn. v. Whitacre*, 92 Ind. 547, it was said that it is not by law made the duty of a county recorder to search the records and certify to the conditions of titles, but if a county recorder, for a consideration, undertook to search the records and certify to the title of real estate, and as to

whether or not it was encumbered, "he would be liable upon such undertaking just as would any other person; he would be liable to the party who employed him, but not to such as might simply see and rely upon such certificate": Citing *Savings Bank v. Ward*, 100 U. S. 195.

In *Schade v. Gehner*, 133 Mo. 252, it was held that the right of action for negligence in the examination of the title to land does not exist in favor of others than the parties to the contract or their privies, although damages may have resulted to such other persons by reason of the negligence. In that case, the examination having been made for a purchaser, and under employment by him, it was held that a right of action for such negligence did not exist in favor of the purchaser's widow and sole devisee and legatee. ³²⁴ The court, referring to cases cited in support of a contrary view, said that they would be found to hold that the particular circumstances of those cases brought the party injured, though not the party directly employing the abstractor, into privity with his contract, and created a duty to him as well as to his immediate employer.

In *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88—an action against an attorney to recover for his negligence in drafting and executing the will of the plaintiff's mother, whereby the plaintiff was deprived of benefits intended by the testatrix—it was held that there could be no recovery. The court stated, as a general doctrine, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties; that where there has been no fraud or collusion or malicious or tortious act, the rule is universal that for injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity by contract or otherwise, by reason of which the former owes some legal duty to the latter.

Lawall v. Groman, 180 Pa. St. 532, 57 Am. St. Rep. 662, was an action to recover damages for alleged loss occasioned by the negligence of an attorney at law. It was said by the court that if the defendant, the attorney, knowing that the plaintiff, the lender, was relying upon him in his professional capacity to see that her mortgage was the first lien, although Roberts, the borrower, was to pay the fees, undertook to perform that duty, he was bound to do it with ordinary and reasonable skill and

care in his profession, and would be liable for negligence in that respect.

In *Siewers v. Commonwealth*, 87 Pa. St. 15, it was said that for the accuracy and truthfulness of his search and certificate a prothonotary was responsible to the persons who employed him to render the service, and not to others; yet where ³²⁵ the certificate was given to the borrower, but the agent of the lender, not being satisfied to ascertain whether the certificate was correct, asked the prothonotary whether it was correct, and the latter replied that it was, and took the certificate and again made the search, and returned the certificate to said agent, saying that it was correct, and that there were no other judgments, and the agent then, relying on the certificate, lent the money, it was held that this was a republication of the certificate, a renewal and delivery thereof to the lender, and that the officer was liable for his negligence in the search.

It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of the title from an abstracter, except for the purpose of thereby furnishing information to some third person or persons who are to be influenced by the information thus provided. If the abstracter in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless. Where the abstracter has no knowledge that some person other than his employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained. How far exceptions ought to be countenanced we will not now undertake to say, but, confining ourselves to the case before us, we are of the opinion that the facts stated in the complaint are sufficient to put the defendant to his answer. Here there was actual communication between the abstracter and the person for whose information the abstract was prepared. The appellant had refused to make the loan until he should be furnished with an abstract, and the abstracter was informed that his abstract was to be used for the particular purpose of inducing the plaintiff to make a loan secured by mortgage on this real estate. He delivered the abstract to the appellant for his use, and certified it to be a correct and true abstract of title; ³²⁶ and he represented to the appellant, before he made the loan, that the title was free and unencumbered, and that there was no lien on the real estate; and the appellant informed the abstracter that he

would rely entirely on the abstract and his representations; and the abstracter informed the appellant, before he made the loan, that he could so rely; and the appellant did so rely in making the loan, having no other knowledge or information. We think it cannot properly be said that the appellee did not owe a duty to the appellant arising under the contract, the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant, the particular person who was to loan his money in reliance upon what the abstracter should do and represent in the premises. If such a duty did arise, the appellee was bound to the person to whom he owed the duty to perform it with reasonable care and skill. However broad and inclusive the statements of the general doctrine in the decided cases, we think that when the facts involved, and the reasons stated in the opinions, to some of which we have referred, are considered, it must be concluded that the view we take of the pleading before us is sustained by the authorities.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

Henley, J., dissents.

Abstracters—Liability of.

One engaging in the business of searching the public records, examining titles to real estate, and making abstracts thereof, for compensation, assumes to possess the requisite knowledge and skill, and undertakes to use due and ordinary care in the performance of his duty; and for a failure in either of these respects, resulting in damages, the party employing him is entitled to recover: *Chase v. Heaney*, 70 Ill. 268; *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115; *Smith v. Holmes*, 54 Mich. 104; *Savings Bank v. Ward*, 100 U. S. 195.

If an abstracter of title to real estate gives a certificate of title, he does not thereby become an indemnitor nor guarantor, but he is liable for any mistake arising from want of due care or diligence, or from ignorance of his business: *Rankin v. Schaeffer*, 4 Mo. App. 108; *Wacek v. Frink*, 51 Minn. 232, 38 Am. St. Rep. 502; *Schade v. Gehner*, 133 Mo. 252. If a register of deeds undertakes to furnish a purchaser of land with a full abstract of title thereto, he is liable in damages for his negligence in carelessly omitting from the abstract any mention of a particular encumbrance by which the purchaser is put to additional expense to perfect his title: *Smith v. Holmes*, 54 Mich. 104. A searcher of records who, in the preparation of an abstract of title, assumes the information derived from a marginal reference in the record-book to be correct, does so at his peril, and is liable in

damages to his employer, who suffers loss owing to his omission to examine the record of the instrument referred to: *Wacek v. Frink*, 51 Minn. 282, 38 Am. St. Rep. 502.

If a party employed by a purchaser to examine the records and make an abstract of title to real estate omits to note the fact of a judgment and sale of the land for taxes, of which the purchaser is ignorant until the time for redemption has expired, whereby he is caused to pay out money to remove the cloud from his title, the person making the abstract is liable in damages to the purchaser for the sum paid out by him to remove such cloud: *Chase v. Heaney*, 70 Ill. 268. An abstractor of title is liable to a person for whom he has prepared and furnished an abstract of title to property, for the damages suffered by such person in consequence of the negligent omission to notice in the abstract an encumbrance against, or any matter which affects the title to, the property: *Security etc. Co. v. Longacre*, 56 Neb. 469. In this case just cited, a person procured an abstract of title to real estate which he contemplated purchasing, and, in reliance on the completeness and accuracy of the abstract, made the purchase, and, as part of the consideration, assumed, and agreed to pay, a debt secured by mortgage on the premises. He lost all that he apparently purchased—the title, the property, and its possession—by a sale without his knowledge, under a judgment in an attachment suit, notice or mention of the pendency of which was omitted from such abstract. After this occurred the mortgage on the property was foreclosed, and the purchaser was made a party to the foreclosure proceedings. He died prior to the sale, and his administrator allowed the property to be sold under the decree in foreclosure for less than the amount of the mortgage debt, and it was held that this furnished no defense for the abstractor in an action by such administrator for damages claimed by reason of such defect in the abstract of title: *Security etc. Co. v. Longacre*. 56 Neb. 469.

If one person undertakes, for a valuable consideration, to furnish another with an abstract of title to land, or a statement of the conveyances and encumbrances affecting it, and incorrectly reports the quantity of land previously conveyed, he is liable to respond in damages to the person who employed him and relied upon the information conveyed by the abstract in purchasing the land: *Clark v. Marshall*, 84 Mo. 429.

A recorder of deeds and mortgages, giving a certificate that he has searched and could find no mortgage, and charging and collecting the fee, allowed by law therefor, is liable on his bond, if it subsequently transpires that there was then a mortgage of record by which the party obtaining the search is prejudiced: *McCaraher v. Commonwealth*, 5 Watts & S. 20, 39 Am. Dec. 58. If a person employs an abstractor to make an abstract of title to certain real estate, and the latter, with no fraudulent purpose, negligently makes a mistake in the abstract, by which the former is led to believe that she has ten days longer to redeem the land from a sheriff's sale than she actually had according to the correct record, and she learns of the mis-

take one day before the time for redemption actually expires, she cannot recover of the abstractor because of her inability to redeem the land, unless she uses ordinary diligence in endeavoring to get the owner to redeem, after the discovery of the mistake, and in informing the abstractor promptly of his mistake, so that he might avert the consequences thereof and liability therefor: *Roberts v. Leon Loan etc. Co.*, 63 Iowa, 76; 69 Iowa, 673.

An abstractor who certifies to a search of certain records is not liable for liens against the property found in records not certified as searched. Thus, where the purchaser of a real estate mortgage relies upon the certificate accompanying an abstract of title, in which it is recited that the abstractor has carefully examined the records of the office of the county clerk, the clerk of the district court, and county treasurer, and that there is of record in said offices no liens upon the property described except as mentioned in such abstract, such abstractor is not liable on his bond on account of the omission from such abstract of a prior mortgage against the property then of record in the office of the register of deeds. The same result follows, although such omission is the result of a conspiracy between the abstractor, the mortgagor, and the holder of such prior mortgage: *Thomas v. Carson*, 46 Neb. 765. In order to render an abstractor liable for negligence in making a search, the damages accruing therefrom must be the direct result of his error or mistake: *Kimball v. Connolly*, 33 How. Pr. 247.

To Whom Liable.—Although there seems to be some tendency under the more modern decisions to adopt the rule announced in the principal case, and hold the abstractor of a title to real estate liable, not alone to the party employing him or in privity of contract with him, but also to anyone who, in good faith, relies upon the correctness of the abstract in making a loan upon, or a purchase of, the property abstracted, yet the great weight of authority is opposed to such doctrine, and the majority of the cases unhesitatingly hold that the liability of an examiner of titles to real estate for want of skill or ordinary care and diligence is only to the party employing him, and an action of damages for errors or omissions in an abstract of title cannot be sustained by a third person acting upon the faith and correctness of the abstract, as there is no privity of contract between him and the abstractor: *Zweigardt v. Birdseye*, 54 Mo. App. 462; *Schade v. Gehner*, 133 Mo. 252; *Houseman v. Girard etc. Bldg. Assn.*, 81 Pa. St. 257; *Mechanics' Bldg. Assn. v. Whitacre*, 92 Ind. 547; *Mallory v. Ferguson*, 50 Kan. 685; *Savings Bank v. Ward*, 100 U. S. 195; *Dundee Mtg. etc. Co. v. Hughes*, 20 Fed. Rep. 30; *Day v. Reynolds*, 23 Hun, 131; *Warvelle on Abstracts*, 8; *Martindale on Abstracts*, sec. 185; *Morano v. Shaw*, 23 La. Ann. 379.

The abstractor knows that his records are to be seen, and titles to be made in reliance upon them, but he is not bound to know that his certificate is for the use or reliance of any but the person who receives it, nor can it be assumed that he gives it for any other use. He contracts with the person who requests and pays for it to give

a certificate which shall state the facts, but he enters into no relation of contract or otherwise in respect to it with any other person, and, if another relies upon it to his injury, he cannot have redress upon the abstractor, because the latter assumed no duty for his protection: *Mechanics' Bldg. Assn. v. Whitacre*, 92 Ind. 547-551.

The fact that the abstractor has knowledge that his certificate as to the title to land is to be used in a sale thereof or loan thereon to advise the purchaser or loaner does not make him liable to the latter for errors or omissions in his certificate of search: *Zweigardt v. Birdseye*, 57 Mo. App. 462. An examiner of titles is liable for his negligence only to the person who requests and pays for the certificate of search. He is not liable to the assignee or alienee of the person so employing him, as there is no privity of contract between them: *Houseman v. Girard etc. Bldg. Assn.*, 81 Pa. St. 256; *Dundee Mtg. etc. Co. v. Hughes*, 20 Fed. Rep. 39. And one employed by a landowner to prepare an abstract of title for the purpose of procuring a loan upon a mortgage is not liable to an assignee of the notes secured by the mortgage, who takes such notes in reliance upon the abstract, for a loss caused by a mistake in the abstract, there being no privity of contract between the assignee and the abstractor: *Talpey v. Wright*, 61 Ark. 275, 54 Am. St. Rep. 206. Under the rule that an abstractor of title is liable only to his immediate employer, and not to the latter's assigns, alienees, or devisees, nor to any third person between whom and himself there is no privity of contract, it has been held that an abstractor is not liable to the widow of his employer for his negligence in making an abstract of title requested and paid for by such husband and employer in his lifetime: *Schade v. Gehner*, 133 Mo. 253. In *Security etc. Co. v. Longacre*, 56 Neb. 469, it was held, however, that the administrator of the person employing the abstractor might recover from the latter for his negligence in making a defective abstract of the title to property under which his employer, the intestate, purchased; and, relying thereon, assumed and agreed to pay a mortgage debt which was not paid, nor the mortgage finally foreclosed at the time of his death.

In the case of *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, it was held that the maker of an abstract of title to real property, guaranteed by him to be correct, is answerable in damages to the purchaser of such property, who relied upon the abstract, and refused to purchase without it, if recorded conveyances were omitted therefrom to his injury, though the abstract was made at the request and expense of and delivered to the owner of the property, who thereupon delivered it to the intending purchaser for examination.

In *Slewers v. Commonwealth*, 87 Pa. St. 15, it appeared that the certificate of search and title made by an abstractor was made, paid for, and given to the landowner and borrower, but the agent of the lender, not being satisfied, asked the abstractor if the abstract in question was correct. The latter replied that it was, and again took the abstract and made a search, returning it to such agent with the affirmation that it was correct, whereupon the agent loaned the

money in reliance upon the abstract, and it was held that this was a republication of the abstract and a renewal and delivery thereof to the lender, and that the abstracter was liable to him for negligence in the search: *Siewers v. Commonwealth*, 87 Pa. St. 15-18.

In *Peabody Bldg. etc. Assn. v. Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757, it appeared that a landowner, desiring to obtain a loan of money to be secured by mortgage, employed an examiner of titles to make a search as to the title to his property, and the examiner, at the request of such landowner, omitted certain mortgages from his certificate of search on the promise of such landowner to have them satisfied of record. The loaner loaned the money on the faith of the certificate of search, and the property was sold upon foreclosure under the omitted mortgages, whereby the loaner lost his money, and it was held that the examiner of the title was liable therefor: *Peabody Bldg. etc. Assn. v. Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757.

Accrual of Action and Limitation Thereof.—A right of action for negligence in the examination of title to land accrues at the time the examination is made and reported, and not when damages result therefrom: *Schade v. Gehner*, 133 Mo. 252; *Russell v. Polk etc. Co.*, 87 Iowa, 233, 43 Am. St. Rep. 381; *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115. And an action against the maker of an abstract of title to recover damages for an error therein, being based upon contract and not on tort, is barred by the statutory period of limitation from the date of the delivery of the defective abstract, although the error is not discovered, and no special damage results therefrom until long after the abstract is delivered: *Russell v. Polk etc. Co.*, 87 Iowa, 233, 43 Am. St. Rep. 381. In California, the action against the abstracter must be commenced within two years after the delivery of the defective abstract, or it is barred by the statute of limitations, although the plaintiff was deprived of a portion of the land by reason of error in the abstract within two years before the commencement of the action for damages: *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115. An action against an abstracter for a false certificate of title is, in Missouri, barred in five years from the delivery of such certificate, and not from the time when it is discovered that the certificate is untrue: *Rankin v. Schaeffer*, 4 Mo. App. 108; *Schade v. Gehner*, 133 Mo. 252.

CITIZENS' STREET RAILWAY COMPANY v. COOPER.

[22 INDIANA APPEALS, 459.]

DAMAGES FOR DEATH—RIGHT OF ACTION.—The right to maintain an action for damages on account of the death of a human being is entirely statutory, and before a person can recover such damages he must bring himself clearly within the terms of the statute.

PARENT AND CHILD—DAMAGES FOR DEATH—RIGHT OF ACTION.—The right of a parent to recover damages for the wrongful death of a child is purely statutory, and an action to re-

cover such damages cannot be maintained by a woman who is not the mother of the child killed, and who has not legally adopted it, although it was given to her in its early infancy, and she has always maintained and treated it as her own.

W. H. Latta and F. Winter, for the appellant.

G. W. Galvin, for the appellee.

⁴⁵⁹ WILEY, J. Appellee sued appellant to recover damages for the alleged negligent killing of a boy fourteen years old. The case was tried by a jury, resulting in a general verdict for appellee, and with the general verdict the jury answered and returned interrogatories. Appellant's motion for judgment on the answers to interrogatories was overruled, and a like motion of appellee was sustained. Appellant's motion for a new trial was also overruled. The complaint was in two paragraphs, and the trial court directed the jury to find for the appellant as to the second paragraph. As no question is presented by the record as to the second paragraph, we need not notice it further. One of the errors assigned is that the court erred in overruling the demurrer to the first paragraph of complaint. We will first review the action of the court in such ruling.

⁴⁶⁰ That part of the complaint which shows the relations that existed between appellee and the boy, and her right, if any, to maintain this action for the alleged negligent death of such boy, is as follows: "That on the ninth day of January, 1880, at the city hospital of the city of Indianapolis, an unmarried woman, wholly unknown to this plaintiff, and also to the officers and attendants at such hospital, and whose identity has never been discovered, and the record of whose accouchement has been destroyed by fire, gave birth to a boy child; that immediately after such birth and on the second day of the life of such child, the mother voluntarily and of her own free will, and by and with the consent of the officer and attendants at the said hospital, gave such boy child to this plaintiff, completely and unreservedly, to be her child. That plaintiff then and there received such gift, and assumed, and has ever since held, the relation to such child of mother; that she gave it her name, nursed, reared, and educated him as her own, and he became and was her child to all intents and purposes; that he became and was known as Hiram Cooper; that at great expense she had reared him and given him a good education, and relied wholly upon him for her future comfort and support; that he was completely devoted to her as to a mother, knowing of no other affection,

and gave to her all of his earnings; that he had no father." The complaint proceeds to describe the manner in which the boy was killed, and the acts of appellant's servants, which are relied upon as constituting actionable negligence. Without detailing the various acts charged, it is sufficient to say that, if appellee has any right of action at all, the averments in the complaint as to appellant's negligence, and freedom from negligence on her part and the part of the boy, are sufficient to withstand a demurrer for want of facts. If appellee has any right of action it is conferred upon her by statute, for at common law actions for the wrongful or negligent killing of a human being did not survive in favor of anyone. We have two ⁴⁶¹ statutory provisions in this state which have changed the common-law rule, and which authorize actions to be brought for the wrongful or negligent killing of persons by certain parties therein named. Section 284 of Horner's Revised Statutes of 1897 authorizes a suit of this character to be brought by an administrator for the benefit of the widow, children, or next of kin. Section 267 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 266) authorizes a father, or, in case of his death, et cetera, a mother, to bring an action for the injury or death of a child, and a guardian for the injury or death of his ward. It is under this section of the statute, if any, that appellee can maintain this action, and she must maintain it as the mother of the child, or not at all. In her complaint, after describing how its natural mother gave the child to her when it was only two days old, she avers: "That plaintiff then and there received such gift and assumed and has ever since held the relation to such child as mother; that she gave it her own name, nursed, reared, and educated him as her own, and he became and was her child, to all intents and purposes." The fact that the complaint avers that she held the relation to the child as mother cannot stand against the facts averred upon which she assumed such relation, for they show that she was not his mother. There are but two ways in legal contemplation by which a woman can be a mother: 1. By giving birth to a child; and 2. By adoption under the statute. Human beings are not the subjects of gifts, as chattels personal, and a natural mother or father cannot give their child to another, and the relation of mother and child, or of father and child, cannot thus be created. Could it be contended with any show of reason, upon the facts charged in the complaint which we have above copied, that if the boy named had survived the appellee he could have inherited

from her, under the law of descent, as her son? We think not, and this of itself is a strong argument against appellee's theory that she has a right to recover for his death. That a parent may, under section 266, supra, maintain an action for the ⁴²² injury or death of his minor child, is firmly settled by the authorities: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241, 49 Am. St. Rep. 192, and cases cited; *Louisville etc. Ry. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, and cases cited. But we are not confronted with the question presented by the cases just cited, for there the actions were by the natural parents, and the right of action in such cases is clearly conferred by statute. The question, however, with which we are confronted, has been firmly settled by the supreme court. *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 50 Am. St. Rep. 334, is in point. Appellant married the mother of a bastard child, and upon such marriage he took said child into his home as a member of his family. The child was killed through the alleged negligence of appellee, and appellant prosecuted an action to recover damages for such death. In construing the statute in connection with the rights of the parties therein named, Monks, J., said: "Such right to maintain an action for damages on account of the death of a human being is entirely statutory and before appellant can recover such damages, he must bring himself clearly within the terms of the statute: *Jackson v. Pittsburgh etc. Ry. Co.*, 140 Ind. 241, 49 Am. St. Rep. 192, and cases cited; *Berry v. Louisville etc. Ry. Co.*, 128 Ind. 484, and cases cited; *Louisville etc. Ry. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, and cases cited; *Tiffany on Death by Wrongful Act*, sec. 116, and cases cited. It is an old and firmly established rule that a statute in derogation of common law must be strictly construed. As this court said in *Indianapolis etc. Ry. Co. v. Keely*, 23 Ind. 133, speaking of this class of actions: 'As the right to sue is purely a statutory one, and in derogation of common law, the statute must be strictly construed, and the case brought clearly within its provisions, to enable the plaintiff to recover': *Stewart v. Terre Haute etc. Ry. Co.*, 103 Ind. 44. Such a right of action exists only for the benefit of the person or persons specified in the statute, and, when the statute specifies who may bring such actions, only those named can maintain it. If no such ⁴²³ persons exist, then no recovery can be had: *Berry v. Louisville etc. Ry. Co.*, 128 Ind. 484; *Metcalfe v. Steamship Alaska*, 130 U. S. 201; *Western Union Tel. Co. v. McGill*, 6 C. C. A. 521; 12 U. S. App. 651; 57 Fed. Rep. 699, and cases cited; *St. Louis etc.*

Ry. Co. v. Needham, 3 C. C. A. 129; 10 U. S. App. 339; 52 Fed. Rep. 371": Thornburg v. American Strawboard Co., 141 Ind. 443-445, 50 Am. St. Rep. 334. Again the court said: "Section 267 (266) supra, does not, in terms, give a right of action to a stepfather. As generally understood, the husband of one's mother by a subsequent marriage is a stepfather; strictly speaking, therefore, a man who marries the mother of a bastard child does not become the stepfather of such child. . . . Applying the principles stated to this case, it is clear that appellant cannot maintain this action. If it were conceded that he was the stepfather of the child named in the complaint, he would not come within the terms of the statute. Indeed, the definition given by Wharton of the word 'stepfather' would be decisive of the question: 'Stepfather—The husband of one's mother who is not one's father.' The word 'father,' therefore, does not mean stepfather, nor does the word 'child' mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing the section of the statute in controversy": Citing many authorities.

The case of McDonald v. Pittsburgh etc. Ry. Co., 144 Ind. 459, 55 Am. St. Rep. 185, is so strongly in point that a somewhat extended reference to it will be profitable. Appellant there prosecuted his action to recover for the death of his minor child. Appellee answered, averring, in substance, that the deceased was a bastard, begotten and born out of wedlock, and that appellant never married the mother of the deceased child, and never adopted him by order of any court. To this answer appellant replied admitting the truth of the averments in the answer, but averred that when the child was six months old he received him from his mother, and relieved her of his care and custody, and acknowledged him ⁴⁶⁴ as his own son, and afterward discharged every duty as a parent toward him, and received from him all the services, obedience, and respect due from a legitimate son; that his mother abandoned him, and was dead; and that the deceased had no guardian or next of kin. A demurrer to this reply was sustained by the trial court, and in discussing the question involved, the court, by Monks, J., said: "As the right to recover damages for the death of a human being is purely statutory, the statute must be strictly construed, and before appellant can recover he must bring himself clearly within its terms. When the statute specifies who may bring such action, only those persons named can maintain it. If no such person exists, then no recovery can be had. At common

law a bastard had no father, and was considered the son of nobody; he was sometimes called *filius nullius* and sometimes *filius populi*. . . . We think it clear, both upon principle and the authorities cited, that the father of an illegitimate child cannot recover damages for the death of such child under the provisions of section 267 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 266)": *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 460, 462, 55 Am. St. Rep. 185. In Blackstone's Commentaries, 459, it is said: "A bastard cannot be heir to anyone, neither can he have heirs; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived."

In Missouri there is a statute providing who may sue and recover for the death of a minor, and that part of it applicable here is as follows: "3. If such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, . . . then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or if either of them be dead, then by the survivor": Mo. Rev. Stats. 1889, sec. 4425.

In the case of *Marshall v. Wabash Ry. Co.*, 120 Mo. 275, the supreme court held that the father of an illegitimate child did not come within the meaning of the ⁴⁰⁵ statute and could not maintain such action. In Pennsylvania, a statute gives a right of action for injury causing death to the "husband, widow, children, or parents of the deceased, and no other relative." Construing that statute, the supreme court held that such action could not be maintained for the death of an illegitimate child: *Harkins v. Philadelphia etc. Ry. Co.*, 15 Phila. 286.

The case of *Citizens' Street Ry. Co. v. Willoeby*, 15 Ind. App. 312, is also in point. There the appellee sued appellant to recover damages for the alleged negligent injury of a boy who was a minor, and was referred to in the complaint as "the adopted son of the plaintiff." The complaint averred that appellee, by reason of such injury, had been compelled to expend large sums of money for medical and surgical services, for attendance, et cetera; that she had been deprived of his services; that such injury was permanent, and that she would thus be deprived of his services to the time of his majority. It was held that the complaint did not aver facts showing that appellee was entitled to the services of the boy, and that both the evidence and facts specially found did not disclose any right of appellee to such ser-

vices. Upon the record it was held that appellee could not recover.

In the case before us, under the authorities, neither the mother nor father of the child, if living, could maintain this action, and this rule rests upon the doctrine that in law a bastard is nullius filius, and as Blackstone says, "has no ancestor." The appellee, as shown by her complaint, is not the mother of the deceased. The averment in the complaint that she "held the relation to such child of mother," does not, in contemplation of law, constitute such relation, when we consider the other averments in the complaint, which clearly show that she was not the mother of the child, and that she had no legal right to his services. The first paragraph of complaint wholly fails to state facts sufficient to constitute a cause of action in appellee, for, as we have seen, such right ⁴⁶⁶ of action is only given by statute, and the allegations of her complaint do not bring her within either the letter or spirit of the statute. The complaint affirmatively shows that appellee does not stand in loco parentis to the child. We cannot enlarge or extend the provisions of the statute by construction, for, as we have seen, the statute, being in derogation of the common law, it must be strictly construed. Its provisions cannot be extended to include any persons except those who are designated by it. The first paragraph of complaint being fatally defective, the court erred in overruling the demurrer to it. This conclusion makes it unnecessary for us to consider the other questions presented by the record. For the error in overruling the demurrer to the first paragraph of complaint, the judgment is reversed, and the court below is directed to sustain such demurrer.

DEATH, DAMAGES FOR—RIGHT OF ACTION.—It must be regarded as a proposition no longer open to question, though sometimes criticised, that at common law no right of civil action for death was recognized or existed, and that such a right of action, as it is known to-day, rests purely in statutory enactments. A plaintiff, in order to sue, must bring himself clearly within the statute: Monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 670, 675; *Hindry v. Holt*, 24 Colo. 464, 65 Am. St. Rep. 235.

DAMAGES FOR DEATH—PARENT AND CHILD.—As to when one is deemed a parent, so that he may sue for the death of his child, see the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 672-675. The word "child" generally means a legitimate child: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459, 55 Am. St. Rep. 185.

INDIANA BOND COMPANY v. OGLE.

[22 INDIANA APPEALS, 593.]

CORPORATIONS—ARTICLES OF INCORPORATION—VALIDITY.—If a corporation organizes under a general act, and inserts in its articles of incorporation regulations and provisions additional to those required by the creative statute, such additional regulations and provisions are void.

CORPORATIONS—CREATION FOR PARTICULAR PURPOSE.—If a corporation claims the right to exist for a certain purpose, it must show that it was organized under a statute authorizing the creation of corporations for that particular purpose.

CORPORATIONS—CREATION FOR PARTICULAR PURPOSE.—A statute providing for the creation of corporations "for the purpose of buying and selling merchandise and conducting mercantile operations" does not authorize the creation of a corporation to buy and sell bonds. The term "merchandise" does not include bonds.

CORPORATIONS—DE FACTO—NUL TIEL CORPORATION.—If there is no grant of power for the creation of the corporation pretended to be organized, there can be no de facto corporation; and, in a suit by such pretended corporation upon a contract executed by it, the other party to the contract is not estopped to deny the corporate existence at the date of the contract.

S. M. Richcreek, for the appellant.

W. R. Gardiner, C. E. Barrett, and E. A. Brown, for the appellees.

593 **ROBINSON, J.** Transferred from the supreme court. Appellant sues as the Indiana Bond Company, averring that it is the holder of certain street improvement bonds, and seeks to enforce the statutory lien against appellees' real estate for an assessment for such street improvement. The complaint does not show in what capacity appellant sues.

Appellees answered in abatement in two paragraphs. In the first paragraph it is alleged that appellant purports to be 594 a corporation organized under and in pursuance of the laws of Indiana, and is assuming to act as a corporation; that appellees deny that appellant is an incorporated company, and deny its right to act as such, and allege that, under the statute under which appellant assumed to have been incorporated, it is necessary for the parties organizing to file in the county recorder's office proper articles of association, signed and acknowledged by the subscribers to the company's capital stock; that the alleged stockholders and incorporators never at any time complied with these statutory provisions, or any of them, and that by reason of such failure there is no such corporation as appellant.

The second paragraph of answer alleges that on the fifth day of February, 1895, certain parties named filed in the office of the secretary of state what purported to be certain articles of incorporation; and on the twenty-second day of March, 1896, the same parties procured from the secretary of state what purported to be a certified copy of these articles of association, and on the twenty-third day of March, 1896, filed the same in the recorder's office of Marion county, and the same were recorded in the miscellaneous record-book of that office, a copy of which purported articles are filed with and made a part of the answer. It is further alleged that appellant has no legal existence, for the reason that on the fifth day of February, 1895, there was no law authorizing the incorporation of appellant, and that the alleged incorporators never at any time filed in the recorder's office of Marion county a duplicate of the alleged articles of incorporation filed in the office of the secretary of state.

The alleged articles of incorporation filed with the answer state that: "The undersigned, and such other persons as may become associated with us by the purchase of stock, desiring to form a corporation under the laws of the state of Indiana for the purpose of carrying on the business of buying and selling bonds, and such other business as may be connected therewith, do hereby certify that we have associated ourselves ³⁹⁵ together for that purpose, and have adopted the following articles of incorporation." It is further provided that the name of the corporation shall be "The Indiana Bond Company"; the capital stock, ten thousand dollars, divided into two hundred shares of fifty dollars each; the business to be carried on in Indianapolis, and such other places as the board of directors may choose; that its business shall be carried on by three directors, which may be increased to five; that the board for the first year shall consist of Benjamin Richcreek, Seth Richcreek, and Arthur Lee; that the corporation shall continue fifty years and that "the object of said corporation shall be the buying and selling of bonds, collecting interest thereon, and such other business as may be connected therewith." The three persons above named signed and acknowledged the above articles—one on the fourth day of February, 1895, and the other two on the fifth day of February, 1895, and the certificate filed in the office of the secretary of state February 5, 1895, and filed and recorded in the office of the recorder of Marion county, Indiana, March 23, 1896. A demurrer to these several paragraphs of answer was overruled, and, appellant refusing to plead further, judgment was

rendered that the action do abate and that defendants have costs.

It is fundamental that a corporation can be created and can exist by virtue of statutory authority, and by that only. If a corporation organizes under a general act, and inserts in its articles of association regulations and provisions additional to those required by the creative statute, such additional regulations and provisions are void. Nor is the corporation permitted to place any restrictions upon the manner of exercising its corporate duties other than the statute provides. If a corporation claims the right to exist for a certain purpose, it must show that it was organized under a statute authorizing the creation of a corporation for that particular purpose: See 1 Cook on Corporations, 4th ed., sec. 4, et seq. It is not claimed by appellant's counsel that at the ³⁹⁸ time of appellant's attempted incorporation there was any law expressly authorizing the creation of a corporation for the purpose of buying and selling bonds; but it is argued that appellant was properly incorporated under section 4583 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 3502), which provides that: "Any number of persons may voluntarily associate themselves, by written articles, to be signed by each person who may be a member at the time of organization, specifying the objects of the same, the corporate name they may adopt to designate such objects pursuant to this act, the names and places of residence of each member or stockholder, with an impression and description of the corporate seal, and in what manner persons shall be elected or appointed to manage the business and prudential concerns of any such association that may have been or shall hereafter be formed for either of the following purposes: . . . 13. To organize associations for the purpose of buying and selling merchandise and conducting mercantile operations." Section 3424 of Burns' Revised Statutes of 1894, and amendment of March 11, 1895 (Acts 1895, p. 255), require a certified copy or duplicate of articles of incorporation to be filed with the secretary of state; and section 4584 of Burns' Revised Statutes of 1894 requires the articles of association to be filed in the recorder's office of the county in which such association may be formed.

We cannot agree with counsel that the thirteenth subdivision of section 4583, supra, authorizes the creation of a corporation for the purpose of buying and selling bonds. The term "merchandise" does not include bonds. A bond is nothing more than a mere evidence of value. While the term "mer-

chandise" does not seem to have any fixed legal signification, yet its commonly accepted meaning is limited to things that have an intrinsic value, in bulk, weight, or measure, and which are bought and sold: *Anderson's Law Dictionary*. See *Kent v. Liverpool etc. Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463. Thus, where a charter, incorporating a steamboat company, granted a right to run a steamboat "for ⁵⁹⁷ the transportation of merchandise," it was held that the term "merchandise" did not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value, in bulk, weight, or measure, and which are bought and sold: *Citizens Bank v. Nantuckett Steamboat Co.*, 2 Story, 16. The legislature itself has taken the above view of the thirteenth subdivision of section 4583, *supra*, and by an attempted amendment to that section in 1895 added a subdivision to the section expressly providing for the incorporation of associations for the purpose of buying and selling state, county, municipal, and all other bonds. It is argued that this amendment is invalid, and various reasons are assigned, but it is unnecessary to enter upon any discussion of that question, for the reason that the amendment, if valid, was passed subsequent to the attempted incorporation of appellant, and no attempt is shown to have been made to incorporate appellant under the amended statute. The question here is, whether at the time of the incorporation there was any law authorizing the creation of a corporation for the purpose of buying and selling bonds.

It is further argued that as appellant has assumed, under color of law and claim of right, to exercise corporate functions, the only method provided for questioning its right to use corporate franchises is by an information in the nature of a quo warranto, filed under the provisions of section 1146 of Burns' Revised Statutes of 1894. It is true that the legality of the organization of a corporation cannot be collaterally questioned, but must be tested by an information; and that where there has been a good faith effort to organize a corporation under the law, and corporate functions have been assumed and exercised, the organization becomes a corporation *de facto*, and, as a general rule, its existence cannot be inquired into collaterally. But the distinction must be kept in view between an attempted incorporation under a statute authorizing the creation of such corporation, and an attempted incorporation ⁵⁹⁸ where no statute authorizes the creation of such a corporation. If there is a law authorizing incorporation, and a good faith effort has

been made to organize under such law, and the company has exercised corporate rights, it becomes a de facto corporation, and its de jure existence can be questioned only by the state: *North v. State*, 107 Ind. 356; *Hasselman v. United States Mtg. Co.*, 97 Ind. 365; *Williams v. Citizens Ry. Co.*, 130 Ind. 71, 30 Am. St. Rep. 201. In the above cases the corporate existence questioned was authorized by statute. But if there is no statute authorizing the organization of a pretended corporation, in a suit by such pretended corporation its right to exist may be questioned by a plea of nul tiel corporation, which has been held to be a plea in abatement. A corporation de facto cannot exist in any case where there is no law authorizing a de jure corporation. And where there is no grant of power existing for the creation of the corporation pretended to be organized, there can be no de facto corporation, and, in a suit by such pretended corporation upon a contract executed by it, the other party to the contract is not estopped to deny the corporate existence at the date of the contract: See *Heaston v. Cincinnati etc. Ry. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Williams v. Franklin etc. Assn.*, 26 Ind. 310; *Indianapolis etc. Co. v. Herkimer*, 46 Ind. 142; *Mullen v. Beech Grove*, 64 Ind. 202; *Piper v. Rhodes*, 30 Ind. 309; *Brown v. Killian*, 11 Ind. 449; *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415; *Harriman v. Southam*, 16 Ind. 190; 1 *Thompson on Corporations*, secs. 505, 523.

In *Heaston v. Cincinnati etc. Ry. Co.*, 16 Ind. 275, 79 Am. Dec. 430, it is said: "A de facto corporation that by regularity of organization might be one de jure can sue and be sued. And a person who contracts with such corporation while it is acting under its de facto organization, who contracts with it as an organized corporation, is estopped, in a suit on such contract, to deny its de facto organization at the date of the contract; but this does not extend to the question of legal power to organize. ~~300~~ Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply."

If the right to dispute the corporate organization exists in such a case as the above, it certainly exists in the case at bar, where there is no contractual relation. The question of what rights, if any, the directors and stockholders of an attempted organization as a corporation might have is not before us in this suit, and upon that question we decide nothing. There was no error in overruling the demurrers to the answers.

Judgment affirmed.

CORPORATIONS—ARTICLES OF INCORPORATION—STATEMENT OF PURPOSE—VALIDITY.—If the purpose, as disclosed in the articles of incorporation, is one not sanctioned by law, no corporation is created thereby. If, on the other hand, a lawful purpose is specified, but the articles assume for the corporation the existence of powers which it is not permitted to exercise, then this additional and unauthorized assumption may be treated as surplusage, and the corporation regarded as entitled to exercise the lawful powers only: Note to *Shick v. Citizens' Enterprise Co.*, 57 Am. St. Rep. 237. The requirement of a statute that the objects or purposes of the corporation shall be stated in its articles must be complied with, and such compliance cannot consist of a vague or general specification: Extended note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 178.

CORPORATIONS DE FACTO exist where there is a law authorizing such corporation, and when the company has made an effort, though irregular and imperfect, to organize under the law, and is transacting business in a corporate name. An association of persons cannot exist as a corporation de facto unless they can legally become a corporation de jure. Where there cannot be a corporation de jure there can be no corporation de facto: Note to *Bergeron v. Hobbs*, 65 Am. St. Rep. 89. To constitute a de facto corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt, in good faith, to comply with its terms, and also a user of, or attempt to exercise, corporate powers under it: *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 Am. St. Rep. 220; monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 181.

CAYLOR v. CAYLOR.

[22 INDIANA APPEALS, 666.]

HUSBAND AND WIFE—CONTRACTS—DECEDENTS' ESTATES.—A contract between a husband and his childless wife, made very shortly before her death, that he would turn over to her nephew all of her property, and pay to such nephew, without diminution, a debt owed by the husband to his wife, is without consideration, and cannot be enforced after the wife's death, under a statute by which, in the absence of a will, a husband inherits the entire estate of his wife.

ACTIONS—PLEADING—HUSBAND AND WIFE.—In an action to enforce the promise of a husband to his wife to turn over all of her property after her death to her nephew, a complaint failing to allege the solvency of the wife's estate, or that it has been settled, is bad and insufficient.

GIFTS CAUSA MORTIS—DELIVERY—HUSBAND AND WIFE.—If a wife, within an hour of her death, called for her nephew, and, on being informed that he was not present, told her husband that she gave to her nephew all of her property then in the husband's possession, and directed him to deliver it to such nephew, which he agreed to do, this constitutes a good gift causa mortis as to personal property and a good delivery of such property.

Roberts & Vestal, for the appellant.

R. Graham and Lamb & Hill, for the appellee.

666 WILEY, J. Appellant filed a claim against decedent's
667 estate, which was passed to the issue docket for trial. The

claim is in two paragraphs, to each of which a demurrer was sustained, and, appellant refusing and failing to plead over, judgment was rendered against him for costs. Sustaining the demurrer to each of said paragraphs is assigned as error.

In the first paragraph it is alleged that appellant from his early childhood until he became of age resided in the family of the decedent, Caylor; that the family consisted of Mary Caylor, wife of said Daniel Caylor, and appellant; that said Mary was the second wife of said Daniel, and childless; that during her married life to decedent she loaned him a large sum of money; that she died intestate May 16, 1895, leaving said Daniel as her only heir; that at the time of her death said Daniel was indebted to her in the sum of fifteen hundred dollars, that at her death she owned divers promissory notes, the makers of which are unknown to appellant; that said notes aggregated at least three hundred dollars; that she owned other personal property to the value of two hundred dollars; that at the time of her death, said notes and personal property were in the possession of the said Daniel; that the said Mary was desirous that appellant should have all her estate at her death, and that, shortly before her death, for the purpose of bestowing her said estate upon him, entered into an agreement with said Daniel by which said Daniel agreed to and was to turn over and deliver to appellant, all and singular, her estate after her death, and account to appellant for all said money and property; that said agreement also provided that the real estate of which she died seised should go to appellant, the same to be taken in full payment of her account against said Daniel; that said Daniel failed to comply with said agreement, except as to the real estate, and converted all of said personal assets to his own use; that, in pursuance to said agreement, said Daniel conveyed all of said real estate to appellant; and, by reason of all of said facts, said estate is indebted to him, et cetera.

The second paragraph is like the first as to all material allegations, and differs from it only in this: In the second paragraph ⁶⁶⁸ it is averred that appellant was the nephew of the said Mary; that on May 16, 1895, she was stricken with disease, which soon developed into an alarming and fatal condition; that within an hour of her death, and believing that she was approaching dissolution, called for appellant, and, being informed that he was not present, she called for the said Daniel, and informed him that she believed she would not live to see appellant, and that she then gave appellant all her property,

both real and personal; that, in pursuance to her said gift, she directed and enjoined upon said Daniel to deliver over and pay to appellant all and singular her property then in his possession; that said Daniel then and there accepted said trust, and agreed to perform the same in all respects; that said Daniel soon after died, without complying with the directions given him by said Mary; that the administrator of the estate of said Daniel took possession of all of said property, mingled it with the assets of the estate of said Daniel, and has failed and refused to account to appellant therefor. In this paragraph it is further alleged that the said Mary died leaving no debts, and that there are no debts against her estate. It is further charged that appellant remained in ignorance of said gift to him until after the death of said Daniel; that he made a demand upon the administrator of his estate to comply with said trust, but that he refused to do so. It is also charged that the said Mary never afterward made any other or further disposition of her property.

Appellant argues that the first paragraph of the complaint rests upon the alleged agreement of Daniel Caylor with his deceased wife to turn over and deliver all of the property of which she died seised, both real and personal, to him; and that the second paragraph of complaint rests upon a gift causa mortis. We may properly adopt the theory of the complaint contended for by appellant, for the rule prevails in this state that a plaintiff must recover *secundum allegata et probata*, or not at all.

Appellee claims that the first paragraph of the complaint is insufficient because there was no consideration on the part of Daniel Caylor to support the agreement. There seems to be some merit in this claim, and we will consider it. Daniel Caylor was the husband of Mary. Their marriage was fruitless in children. By the averments of the complaint the said Mary was without heirs, other than her husband. It follows, therefore that at her death, in the absence of a will, or other legal disposition of her property, the said Daniel would inherit her entire estate: Burns' Rev. Stats. 1894, sec. 2651; Horner's Rev. Stats. 1897, sec. 2490. It also appears from the complaint that Daniel was indebted to Mary in the sum of fifteen hundred dollars for money loaned to him. While this amount, during her life, was a claim against him which she might have enforced, yet at her death said indebtedness would have become liquidated and canceled, for it was a part of her estate, and he was entitled to the whole estate; otherwise, it would have been a debt against himself, and this could not exist. So we find from the com-

plaint that Daniel not only agreed to turn over and deliver to appellant upon the death of Mary all of her estate, but also promised to pay to appellant the fifteen hundred dollars which he had borrowed of her, which, by her death, he would not be otherwise bound to pay. By this agreement he relinquished all of his right, title, and interest in the estate of his wife, and promised to deliver it all to appellant.

In all contracts and agreements, there must be some consideration to support them. A contract without any consideration is a nudum pactum. From the allegations of the first paragraph of the complaint we are unable to discover any consideration moving to Daniel for the agreement. Daniel was given nothing by his wife, by the averments of the complaint, which can be construed into a consideration for his promise to pay to appellant the fifteen hundred dollars, or to turn over to him all of her property. There was to be no diminution of the amount her husband owed her, as any consideration for his ^{or} promise to pay fifteen hundred dollars to appellant, but under the averments of the first paragraph, the entire amount was to be paid. At the death of his wife, the debt owing to her by Daniel would have been abrogated or canceled, because he was her sole surviving heir, and the amount would have become his own by inheritance, subject only to debts against her estate. Also, under the first paragraph, Daniel, as the husband of Mary, was given nothing which could be construed into a consideration for his promise to pay appellant fifteen hundred dollars, or to turn over to him the entire estate of the said Mary. To enforce this alleged agreement would be to hold that the said Daniel abandoned every right he had in the estate of his deceased wife, and that, too, without any consideration moving to him for the performance of the agreement on his part. There is a further objection to this paragraph. It is not charged that the estate of Mary was solvent, that there were no just claims against it, or that it had been settled. Her estate was subject to the payment of all of her debts, and she could not dispose of her property in derogation of the rights of her creditors. A pleading will be construed most strongly against the pleader. The court correctly sustained the demurrer to this paragraph of complaint.

We will next consider the sufficiency of the second paragraph of the complaint. As we have seen, the theory of this paragraph is that the facts constitute a gift causa mortis. We will enter upon the discussion of this question with the fact in view that gifts causa mortis are not favored in law. In 3 Wait's Ac-

tions and Defenses, 502, it is said: "Gifts causa mortis are not favored in law. They are said to be a fruitful source of litigation, often bitter, protracted, and expensive. They lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. . . . To constitute a valid gift causa mortis, three things are requisite: 1. It must be made with a view of the donor's death from present illness or from external or apprehended ^{or} peril; 2. The donor must die of that ailment or peril; 3. There must be a delivery": See, also, *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Parcher v. Savings Inst.*, 78 Me. 470; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Dickeschied v. Bank*, 28 W. Va. 340. In volume 8, first edition, of the American and English Encyclopedia of Law, page 1342, in note 1, it is said: "Such transfers of property are not, as a rule, favored by the courts, for the reason that they are open to the objections of uncertainty, which the law seeks to avoid, in reference to wills, by its strict provisions and precautions as to their execution and proof. Great strictness and clear proof are, therefore, required to establish such gifts, and they can only be upheld when the intention of the donor is clear and definite, and such intent is fully carried out by execution": See *Parsons on Contracts*, 6th ed., 2237; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Marshall v. Berry*, 13 Allen, 43, note. In volume 8, first edition, of the American and English Encyclopedia of Law, at page 1348, under note 1, it is said: "Gifts causa mortis have the nature of a legacy, and the policy of our law does not favor them while there is provision, by the statute of wills and the law of descents, for the transmission of all property rights." Under the facts pleaded in this paragraph of complaint, it is sufficiently clear that at least two of the prerequisites necessary to constitute a gift causa mortis were present: 1. Impending death from present ailment; and 2. That the donor died of that ailment. The controlling and difficult question, to our minds, is the third prerequisite, and our conclusion must rest upon whether or not the facts constitute or show a valid delivery of the property donated. It is the recognized law, in all cases of this character, that to complete a gift and make it valid there must be a delivery of the property given. It sufficiently appears that there was no

delivery directly to the donee, for it is shown that he was not present when the gift was made. But the weight of modern authority ⁶⁷² holds that delivery to a third person, for the benefit of the donee, is sufficient, where there is an actual change of possession, and, although the donor dies before the third person delivers the property to the donee, the gift may be enforced: *Michener v. Dale*, 23 Pa. St. 59; *Jones v. Deyer*, 16 Ala. 221; *Dresser v. Dresser*, 46 Me. 48; *Dole v. Lincoln*, 31 Me. 422; *Sessions v. Moseley*, 4 Cush. 87; *Conner v. Root*, 11 Colo. 183; *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626. The most recent and exhaustive discussion of the question we are now considering we find in *Devol v. Dye*, 123 Ind. 321. From the special findings in that case, it appears that one William J. Devol died intestate, leaving a large estate, and leaving one brother and the descendents of three deceased brothers as his only heirs. He had been in ill-health for a long time prior to his death. He was president of a bank, and kept a tin box in the vault, in which he kept money and other valuables. The drawer in which he kept the box, and the box itself, was kept locked, and no one had access to it but himself. He went south for his health, and, before going he intrusted his key to this box and private drawer to the cashier of the bank, and these remained in the custody of the cashier until after the testator's death. Soon after his return from the south, he sent for Mr. Lane, the cashier, and declared to him that it had always been his purpose to give to one Pressley G. Dye, his cousin, five thousand dollars, either in cash or bank stock; that he had put two thousand dollars in gold in a sack, and marked the name "Dye" upon it, and left it in the tin box. He then directed the cashier to go to the bank and count out three thousand dollars more in gold coin and put it in a sack and mark it as the other was marked; and that he should also count out one thousand dollars in currency, and place it in an envelope for a Mrs. Nickerson, and put her name upon it. He then directed the cashier, in case of his death, that the sacks and packages should be delivered to the parties indicated by the writing thereon. These directions were carried out by the cashier, who retained the ⁶⁷³ keys to the box and drawer; and the testator died in two or three days after he gave the directions just specified. The supreme court, by Mitchell, C. J., said: "A gift causa mortis is consummated when a person in peril of death, and under the apprehension of approaching dissolution from an existing disorder, delivers, or causes to be delivered, to another, or affords the other the means of obtaining possession

of any personal goods for his own use, upon the express or implied condition that in case the donor shall be delivered from the peril of death the gift shall be defeated. . . . The concurrence of three things is essential to the consummation of a gift *causa mortis*: 1. The thing given must have been the personal goods of the donor; 2. It must have been given while the latter was in peril of death, or while he was under the apprehension of impending dissolution from an existing malady; and 3. The possession of the thing given must have been actually, or constructively, delivered to the donee, or to some one for his use, with the intention that the title should then vest conditionally upon the death of the donor, leaving sufficient assets in addition to pay his debts. A mere unexecuted purpose, however clearly or forcibly expressed, so long as it rests merely in intention, is not effectual. The intention must not only have been manifested, but, in addition, in order to consummate the gift, the donor must have transferred the possession of the thing to the donee in person, or to some other for his use, under such circumstances as that the person to whom delivery is made is thenceforth affected with a trust or duty in the donee's behalf": Citing *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; 21 Am. Law Rev. 732; 19 Com. L. J. 222; *Walsh's Appeal*, 122 Pa. St. 177, 9 Am. St. Rep. 83. Continuing, the learned judge said: "It is well settled, however, that the delivery need not be made to the donee personally, but may be made to another as his agent or trustee. A delivery thus made is as effectual as though it had been made directly to the donee." ⁶⁷⁴ Thus, in *Milroy v. Lord*, 4 De Gex, F. & J. 264, Lord Chief Justice Turner said: 'I take the law of this court to be well settled that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by transferring the property to the persons for whom he intends to provide and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purpose of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol.'

In the case from which we have just been quoting it was held that as it appeared from the facts found that it was clearly the intention of the donor to make the gifts indicated, that he had

relinquished the keys to his private drawer and tin box to the cashier of the bank, thereby effectually surrendering, so far as could be, all dominion over the property, and affording to the donees the means of obtaining possession of it, that it was a valid gift *causa mortis*, and should be upheld. The learned chief justice, in concluding his discussion, said: "Without pausing to review the authorities, it is sufficient to say that where property is delivered to a third person for the use of another, as a gift *causa mortis*, and its delivery is accompanied by a written declaration clearly indicating that it is delivered for the use, or upon a trust for an intended donee, or where a deathbed delivery is made in the presence of witnesses, who are disinterested and called for the purpose, the intention of the donor should not be permitted to fail by a narrow and illiberal construction, in case a delivery corresponding with the condition of the donor and the situation of the property was actually made": *Williams v. Guile*, 117 N. Y. 343; 2 ⁶⁷⁵ *Schouler on Personal Property*, sec. 179; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178.

In *Wyble v. McPheters*, 52 Ind. 393, Andrew A. McPheters delivered to William McPheters some money and bonds, with direction to deliver the same to appellants and one Allie upon the death of the said Andrew. The court, by Worden, J., said: "It is claimed by the appellees that each paragraph of the complaint was bad, because there was no complete delivery of the money and bonds, and therefore the gift cannot be sustained as a gift *inter vivos* or *causa mortis*. We, however, are of a different opinion. It appears in the first paragraph that the money and bonds were, in the lifetime of Andrew A. McPheters, by him delivered to the defendant William M. McPheters, with directions to deliver the same to the plaintiffs and said Allie, deceased, upon the death of him, the said Andrew A., and that said William M. received the same and agreed to execute the trust reposed in him. There was a sufficient delivery to constitute a valid gift *inter vivos*. The delivery to William M. McPheters was absolute, unconditional. The subject of the gift was to be unconditionally delivered by him to the plaintiffs (and said Allie) upon the death of Andrew A., an event which at some time must have taken place. The latter delivery was to depend upon no condition; the time thereof only was uncertain. The second paragraph was equally good. The transaction created the relation of trustee and beneficiaries between William M. McPheters and the plaintiffs: See *Miller v. Billingsly*, 41

Ind. 489. A delivery to a trustee for the use of the party to be benefited is as effectual as a delivery to the party himself," et cetera.

Under the authorities, the second paragraph of the complaint was good as against a demurrer for want of facts. The transaction between Mary and Daniel Caylor relative to the disposition of her property created a trust, with the latter as trustee and appellant as the cestui que trust. The facts ⁹⁷⁶ pleaded show a gift causa mortis. It is evident from the facts that it was the intention of Mary to bestow her entire estate upon appellant. He was the object of her bounty, and was to be the recipient of her generosity. While, it is true, the notes and personal property described in the complaint were at the time of the gift in the possession of Daniel, and no change of possession was made, yet we cannot see that this fact vitiates the gift. It would, it seems to us, have been an idle and useless ceremony at the time of the gift for Daniel to have delivered to Mary the possession of the property bestowed, and she in turn to have immediately redelivered the same to him for the use and benefit of appellant. The law does not deal in trifles, nor require the doing of unnecessary things. Suppose the gift had been made to Daniel himself, it certainly could not be contended with any show of reason that, to constitute a delivery to him, while the property was in his possession, it would have been necessary for him to have turned it over to Mary, and for her to then have made a manual delivery to him. *Tenbrook v. Brown*, 17 Ind. 410, seems to be decisive of the question we are discussing. There appellee claimed certain property as having been given to him by his father, and, at and before the time of the gift, the property was in the possession of the donee. The court said: "Now, it seems clear enough that if the property in question was in the possession of the defendant, as agent or manager for his father, at the time of the gift, still his father might execute to him a valid gift of the property while thus in his possession. The law clearly would not require, in such case, that he should first surrender his actual possession to his father, in order that his father might redeliver the property to him in the execution of the gift. It would seem that in such case the gift would be complete if the father bestowed the property upon the defendant and relinquished all dominion and control over it, and recognized the defendant's possession thereof as being in his own right," et cetera. Here Mary Caylor relinquished all dominion

and control over the property, and intrusted it to Daniel Caylor to be by him delivered to appellant. While every case must be brought within the general rule that to constitute a valid gift *causa mortis* there must be a delivery of the property or the thing given to the donee, or to a third person for his use and benefit, yet, as the circumstances under which such gifts are made must of necessity be varied and infinite, the courts must determine each case upon its own peculiar facts and circumstances: *Devol v. Dye*, 123 Ind. 321; *Dickeschied v. Bank*, 28 W. Va. 340; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601.

In the case before us every essential element to a valid gift *causa mortis* is present, from the averments of the second paragraph of complaint, and our conclusion is that the facts pleaded show such a gift. In reaching this conclusion, we do not wish to be understood as holding that there was a valid gift of the real estate described, for, as we have seen, gifts of this character apply only to personal property, and title to real estate cannot thus pass. But, as Daniel Caylor has conveyed the real estate to appellant, that question is eliminated from the case, and can have no weight in its decision. The second paragraph of the complaint being sufficient, it was error to sustain the demurrer. The judgment is reversed, and the court below is directed to overrule the demurrer to the second paragraph of complaint.

GIFTS CAUSA MORTIS—DELIVERY TO THIRD PERSON.—

Any delivery of a gift *causa mortis* is sufficient which is as complete as the nature of the thing given and the circumstances of the parties permit, and which enables the donee to obtain control of the object which it is intended to transfer: Note to *Larrabee v. Hascall*, 51 Am. St. Rep. 445. Delivery may be made to a third person for the benefit of the intended donees, if possession is retained up to the time of the donor's death: *Borneman v. Sidlinger*, 15 Me. 429, 83 Am. Dec. 626. Where there was a delivery to two sons for the benefit of other children and grandchildren. see *Kemper v. Kemper*, 1 Duvall, 401, 85 Am. Dec. 636. Delivery by a man to his wife for the benefit of a grandchild: *Grymes v. Hone*, 49 N. Y. 17, 10 Am. St. Rep. 313. But see *Appeal of Walsh*, 122 Pa. St. 177, 9 Am. St. Rep. 83, where a delivery to a third person was held not to be good. It has been held that a gift *causa mortis* cannot be made by mere parol, but a delivery of the thing intended to be given is essential: *Bradley v. Hunt*, 5 Gill & J. 54, 23 Am. Dec. 597.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

UPTON v. COXEN.

[80 KANSAS, 1.]

HOMESTEADS—OCCUPANCY.—If a person purchases land, intending to occupy it as a homestead, and in good faith moves thereon and begins the erection of a dwelling-house one day before a judgment under which a lien is claimed is filed, such property is exempt as a homestead, although occupied by a tenant for several months thereafter.

HOMESTEADS—OCCUPANCY.—The purchase of a home with the intention to occupy it as a homestead, followed by actual occupancy within a reasonable time, impresses it, ab initio, with the homestead character and inviolability.

HOMESTEADS.—TEMPORARY POSSESSION BY A TENANT whose rights and use are not inconsistent with the homestead rights of the owner does not deprive the premises of their homestead character.

T. H. Foster, for the plaintiff in error.

J. Guthrie and E. A. Austin, for the defendants in error.

² **JOHNSTON, J.** This proceeding involves the homestead right of Theodosia Coxen and her husband, Oscar L. Coxen, to an eighty acre farm in Wabaunsee county. Theodosia Coxen inherited one-fourth of the land from her father and purchased a one-half interest from the other heirs. Upton claims title to the three-fourths interest acquired by Mrs. Coxen through a sheriff's deed, which was based on a judgment and execution against Mrs. Coxen. The judgment was rendered by the circuit court of Shawnee county on January 18, 1892. On May 10, 1893, a transcript of that judgment was filed in Wabaunsee county. An execution on the judgment was issued and a levy

made on the land in August, 1893, under which a sale of the land was made to Upton, the judgment creditor. It appears, however without dispute, that one day before the transcript of the judgment was filed in Wabaunsee county, and when they held the undivided three-fourths interest in the land, Theodosia Coxen and her husband entered upon the land, claiming the same as their homestead, and have continued to occupy it as such ever since that time. On May 9, 1893, they purchased lumber and building material, took the same upon the land, and began the erection of a house. This house, although an inexpensive one, was completed and occupied by them until they gained possession of the old house, which was then occupied by a tenant to whom the farm had been leased by an administrator. The tenant grew a ³ crop upon the cultivated land, and his possessory right was not terminated until late in the fall of 1893. The Coxens, however, under an arrangement with the tenant, used a portion of the land for a garden and as a pasture.

It is clear that the property became the homestead of the Coxens on May 9, 1893, before the judgment of Upton became a lien thereon, and before the proceedings under which the sale of the property was made to him. The uncontradicted testimony is that the property was acquired with the intention of using the same as a homestead. They moved upon the property in good faith, and they were in actual occupancy of the premises one day before the judgment of Upton was filed in the district court of Wabaunsee county. It is true that the time between actual occupancy and the filing of the judgment was very short, but it was sufficient to give a priority of right to the Coxens. There can be no question, however, about the time, as the land was acquired some time before the actual occupancy of the same, and it is settled that the purchase of a home, with the intention to occupy it as a homestead, followed by actual occupancy within a reasonable time, may impress it ab initio with homestead character and inviolability: *Edwards v. Fry*, 9 Kan. 425; *Gilworth v. Cody*, 21 Kan. 702.

It is contended that because of the possessory right of the tenant to the premises there was not such an occupancy by the Coxens as to bring it within the provisions of the homestead law. The premises constituted a single tract and did not exceed in area the exemption provided by the homestead law. The fact that some one else may be temporarily upon the premises and may be actually using a portion of the ⁴ same does not deprive them of the homestead character. The possession of the tenant

was temporary and subordinate to the rights of the owner, and the use which he was making of the land was not inconsistent with the homestead rights of the Coxens. The tenant only remained until the end of the crop season, when he surrendered the temporary possession to the Coxens, who had claimed the entire premises as a homestead from the beginning. Under the interpretation which has been frequently given to our homestead provisions, the occupancy was sufficient to create the homestead right in the whole of the premises, and the plaintiff therefore acquired no right thereto upon his judgment or the proceedings taken thereunder: *Bebb v. Crowe*, 39 Kan. 342; *Hoffman v. Hill*, 47 Kan. 611; *Layson v. Grange*, 48 Kan. 440; *Pitney v. Eldridge*, 58 Kan. 215.

The judgment of the district court will be affirmed.

HOMESTEAD—OCCUPANCY.—If a person buys a lot for a home, and erects a house thereon, a creditor cannot acquire a lien on the property, if, within a reasonable time, the purchaser moves on the property and occupies it as a homestead: *Wike v. Garner*, 179 Ill. 257, 70 Am. St. Rep. 102, and note.

HOMESTEAD—LEASE OF.—Ordinarily, a lease of a homestead for life is conclusive evidence of an abandonment of it; but, where the lease reserves to the lessor the right to return to the homestead, and it is his intention to return, there is no abandonment: *Note to Goff v. Jones*, 8 Am. St. Rep. 623. Temporary removal from a homestead and a lease thereof does not operate as an abandonment: *McDermott v. Kernan*, 72 Wis. 268, 7 Am. St. Rep. 864; *Boot v. Brewster*, 75 Iowa, 631, 9 Am. St. Rep. 515.

MISSOURI PACIFIC RAILWAY COMPANY v. MOFFATT.

[90 KANSAS, 112.]

NEGLIGENCE—PLEADING AND PRACTICE.—A petition alleging negligence in general terms may be amended so as to set forth the facts, although the period of limitations for the bringing of the action has expired when the amendment is made.

ACTIONS—REVIVOR—PARTIES.—Proceedings in revivor are not necessary in substituting another next friend for one who has previously acted for an infant.

NEGLIGENCE—INJURY AT RAILWAY CROSSING.—The fact that a man killed on a railway crossing was careful and sober, and had previously exercised due care there, tends to repel any inference of negligence on his part arising from the mere fact that he was upon the track and struck by a locomotive.

NEGLIGENCE—BASIS FOR DAMAGES.—In an action by the next of kin to recover damages, for a death caused by negligence at a railway crossing, a sufficient basis for an award of damages may be found in the character, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries.

TRIAL—SPECIAL FINDINGS.—It is not error to permit the withdrawal of special questions from the jury, where it does not appear that defendant's special questions were formed with reference to those of plaintiff and allowed to be withdrawn, or that defendant was in some way prejudicially affected by such withdrawal.

Waggener, Horton & Orr, for the plaintiff in error.

Hutchings & Keplinger, Hale & Fife, and J. F. Mister, for the defendants in error.

¹¹⁴ **JOHNSTON, J.** This is the second time that we have been called upon to review the proceedings in the trial court in this case: Missouri Pac. Ry. Co. v. Moffatt, 56 Kan. 667. On the first review it was held that the averments of the petition were not sufficiently specific to justify the admission of proof of the negligence of the company beyond its failure to give proper signals and due warning of the approach of its trains, and, because the trial court admitted testimony and submitted grounds of negligence to the jury not definitely pleaded, the case for that and other reasons was remanded for a new trial. After it was so remanded, the plaintiffs below amended their petition by alleging that the railway company was negligent in failing to give signals other than those required by the statute, and in failing to have a gate, a flagman, or an electrical alarm at the highway crossing where Andrew C. Moffatt was struck and killed by a locomotive attached to one of its passenger trains. Several years intervened between the filing of the original petition and ¹¹⁵ the amendment, and it is now claimed that the court was not warranted in permitting the plaintiff to set up the additional grounds of negligence.

The company assumes that a new cause of action is stated in the amended pleading, and it is contended that as to such new cause of action it must be deemed to have been commenced when the amendment was made, and not when the action itself was commenced, and therefore that it was barred. This contention cannot be successfully maintained. No new cause of action was set forth in the amended petition. The cause of action set forth in each of the pleadings was the negligent killing of Andrew C. Moffatt. In the original petition it is alleged that on the morning in question the company ran its engine and cars at a high rate of speed over a dangerous crossing without giving any warning of the approach of the train, and without using the bell or blowing the whistle, "and without using any other lawful, safe, and prudent methods of notifying the public or said Andrew C.

Moffatt of the approach of said engine and cars." It will be observed that the only negligence specifically alleged was the failure to blow the whistle and ring the bell, and for that reason the petition was held to be defective. The pleading did set forth in a somewhat indefinite way that the company failed to take other precautions which it should have taken, and which might have averted the injury. The amended petition set forth definitely that which had been pleaded generally in the original petition, and therefore it cannot be said that a new cause of action or a new ground of recovery was introduced.

The next exception was to the allowance of a new next friend to appear for the three infant plaintiffs. ¹¹⁶ It appears that after the first trial Eliza M. Moffatt, who acted as the next friend for three of the minor children, died, and when the last amended petition was filed Charles Moffatt, who in the meantime had reached majority, was named as the next friend of Wilbur and Florence Moffatt. It is contended that by the death of Eliza M. Moffatt the action become dormant as to the infant plaintiffs, and that another next friend could only be substituted by proceedings in revivor, and that as there had been no revivor the action was abated. While the action of an infant under the statute may be brought by his guardian or next friend, the infant is the real party to the proceeding. The infants were parties to the proceeding from its inception, and their rights, which were involved in the action, belonged to themselves. The next friend had no title to or right in the subject matter of the action, but was merely brought into court to protect the rights of the infant. The court in which the proceeding is pending guards the interest of the minors, and in the exercise of its power may, when it becomes necessary, remove one next friend and appoint another. It is also true that, when the infant arrives at majority during the pendency of the suit, that fact may be entered upon the record, and he may thenceforth proceed in the suit alone. No formal proceedings to revive are necessary, as the next friend is neither technically nor substantially a party to the action, but only appears as an agency of the court to guard and protect the interests of the minors, who are the real parties to the proceeding. The statute with reference to the revivor of proceedings has no application to cases where there is a change of next friend, and hence there was no abatement of the action.

¹¹⁷ We are unable to agree with the claim that the evidence and special findings of the jury show contributory negligence on the part of Moffatt. The negligence of the railway company was

sufficiently shown. The injury was carelessly inflicted on a foggy morning and at a dangerous crossing, when and where extraordinary precautions should have been taken by the traveler as well as the trainmen. It was shown and found that Moffatt was familiar with the crossing and appreciated the danger of passing over it; that on previous occasions, and when his son accompanied him, before attempting to make the crossing he required his son to get out of the buggy and go forward to the track to ascertain if a train was approaching; that he was alone when the accident occurred, and that he then knew and appreciated the danger of attempting to make the crossing without taking the same precautions that he had previously taken when his son was with him. The testimony as to the care exercised by Moffatt in approaching the track is very meager, but there is no affirmative testimony or any finding of a want of care on his part. There were only two eye-witnesses of the collision—the engineer and fireman on the train which struck Moffatt—and on account of the fog he was only discovered a moment before he was struck. They stated that the team was upon the track and that he appeared to check them. In the statement which he made before he died, Moffatt said that he did not discover the train until he was upon the track, and that the team would neither go forward nor backward. The train was traveling from thirty to thirty-two miles an hour, and it is evident that there was not sufficient time for him to get out of the way after he saw the train or after the ¹¹⁸ trainmen had discovered him. One of them states that he was not seen until the train was within forty feet of the crossing, and the other that he was not seen until the train was within fifty to one hundred and twenty feet from the crossing. Whether he stopped and listened for the train, or whether he left his team and went forward to look for the train upon his approach to the crossing, is not shown, nor does anything appear to indicate that he failed to take reasonable precautions for his safety.

We cannot assume that he was guilty of contributory negligence. Aside from the instinct of self-preservation, there is proof that he was a sober, careful man, and had previously exercised due care for his safety on approaching the same crossing. Who can say that he did not stop, look, and listen before going upon the crossing, or that he failed to exercise that degree of care which the conditions and circumstances required? He was a middle-aged man, with good health and the instinct of self-preservation strong within him, sober and exceedingly careful,

and these facts and circumstances are not without weight in repelling any inference of negligence that might arise from the mere fact that he was upon the track and was struck by the locomotive. The plaintiffs are not required to show the absence of negligence, but, before it can avoid the consequences of its negligence, the company must show that Moffatt's injury and death were due to his own negligence. The claimed mismanagement of the team is of but little importance, since it is clear from the testimony that there was not sufficient time for him to drive the team off the track after the peril was discovered. The general verdict in effect finds that he was not negligent, and we discover nothing in the special findings inconsistent with the general verdict.

¹¹⁹ It is next contended that the evidence in the case did not afford a basis for the award of substantial damages. It was shown that at the time of the accident Moffatt was fifty-one years old, in good health, and that he supported a family of six children, four of whom were girls. One of the children only assisted in the support of the family. It is further shown that during the last years of his life he had been engaged in painting and calcimining, and also in the wall-paper and piano business. At the same time he was carrying on a farm near Kansas City. The testimony is that he was sober and industrious, but there is nothing in the testimony to show the amount of the earnings or profits which he derived from his labor and business. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries. It is difficult to show direct and specific pecuniary loss which the next of kin suffer from the death, as the real value of a life is problematical and speculative to a certain extent. No fixed rule of measurement can be laid down, and much is necessarily left to the judgment and discretion of the jury. In estimating the damages, the jury should take the facts proved in connection with the knowledge and experience possessed by them in common with men in general to determine the pecuniary value of the life taken. Mathematical accuracy in measuring the pecuniary loss suffered is not practicable, and, in general, it may be said that the basis for the allowance of damages may be found in the character, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin. The court is of the opinion that with ¹²⁰ the elements thus furnished the jury may make a fair estimate of the damages that are recoverable.

The writer is inclined to the view that the evidence is not sufficient as a basis on which to compute pecuniary loss. No evidence was given as to the amount which Moffatt earned or had earned, nor as to the amount of pecuniary aid or benefit which it would have been possible for him to give to his children in the future. The jury may very well consider his character and condition and his capacity for earning money and his expectancy of life, but some evidence should certainly be given of the profits of labor of the deceased, and what in all probability he might earn for the future support of his wife and children. While much must be left to the discretion and judgment of the jury, it is not unlimited; they must be guided by the fixed rules of law, and they cannot award substantial damages without proof of the extent and character of the pecuniary loss suffered. What his income was, what it had been, how much he was capable of earning, how much he had been in the habit of contributing to his children, and how much he would be able to contribute in the future, were facts which could have been easily proved, and which would have afforded a basis for the verdict rendered. No evidence of this kind was offered, and not even the expectancy of life was shown. In the absence of proof, the jury were left to guess at or speculate upon the pecuniary value of Moffatt's life, and although they had no real basis for determining the extent of the plaintiff's loss, they found a verdict for five thousand dollars. In the absence of proof of the extent of the pecuniary loss, the jury can allow nominal damages only.

¹²¹ Complaint is made that the court refused to submit three special questions requested by the company. Out of seventy-nine special questions proposed by the company only three were refused by the court, and these, in our judgment, are not material, and their refusal was not error. The court also submitted sixteen particular questions of fact which were presented by the plaintiffs, and when the jury returned their general verdict these questions were left unanswered. Upon the application of the plaintiffs they were withdrawn from the consideration of the jury over the objection of the company. We think no error was committed in allowing the withdrawal of these questions. They had not been requested by the party objecting to the withdrawal, nor does it appear that the fact that they were presented influenced or affected the company in presenting interrogatories in its own behalf. It does not appear that the questions asked in behalf of the company were framed with reference to those asked

by the plaintiffs below, or that the list presented in behalf of the company would have been longer or shorter by reason of the presentation of those which were subsequently withdrawn. In the absence of a showing of prejudice by reason of the withdrawal it cannot be regarded as a reversible error.

It is finally claimed that some of the findings are not supported by the evidence, and it appears that two of the answers are not strictly accurate. In the view we take of the case, however, they are not deemed to be very material, and when the findings of the jury are considered together they do not betray any passion or prejudice, nor such a willful disregard of the evidence as would warrant the overthrow of the verdict.

The judgment will be affirmed.

NEGLIGENCE—PLEADING AND PRACTICE—STATUTE OF LIMITATIONS.—In an action against a carrier on a contract of carriage to recover for injuries to livestock arising from negligence in delivery to a connecting carrier, amendments to the complaint correcting a misdescription of the contract, or otherwise curing an imperfect statement of the same subject matter, or adding new averments of facts more clearly showing the negligence complained of, or otherwise altering the grounds of recovery, or varying the alleged mode in which the carrier has violated his duties growing out of his agreement in the contract, should be allowed, and are not subject to the bar of the statute of limitations, if the action was commenced within the time designated by the statute: *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119; *Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa, 56, 14 Am. St. Rep. 196.

NEGLIGENCE—INJURY AT RAILWAY CROSSING.—Neither negligence nor contributory negligence is presumed from proof of an accident on the track of a railway, resulting in personal injuries: *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597. A person traveling upon a highway, in full possession of all his faculties, who is killed by a railway train at a level crossing, is presumed to have been exercising ordinary care, in the absence of evidence of his negligence: *Huntress v. Boston etc. R. R.*, 66 N. H. 185, 49 Am. St. Rep. 600.

NEGLIGENCE CAUSING DEATH—DAMAGES.—The measure of damages under most of the statutes giving a right of recovery for the death of a person is the present value of the reasonable expectation of pecuniary advantage to those entitled to recover which they have lost by his death. It is the amount of pecuniary assistance and support which they might reasonably have expected to receive from the deceased had he lived. The jury may, in estimating the value of the life of the deceased to the survivors, take into account his age, health, habits of life, capacity for making a living for himself and family, his condition in life, the probable duration of his life, the wages he was actually earning, and his disposition to be industrious and frugal, or otherwise: *Extended note to Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 373, 379.

RENFROW v. RENFROW.

[60 KANSAS, 277.]

MARRIAGE AND DIVORCE—COMMON-LAW MARRIAGE
—FAILURE TO COMPLY WITH STATUTE.—A contract of marriage good at common law is good notwithstanding the neglect of statutory forms relating to the subject and imposing a penalty, unless the statute itself contains express words avoiding the marriage because of failure to conform to such statutory requirements.

MARRIAGE AND DIVORCE—COMMON-LAW MARRIAGE
—WHAT CONSTITUTES.—To constitute a valid common-law marriage, it is not necessary that the parties shall have expressly agreed to live together as husband and wife, and the agreement to so live may be implied from their conduct and declarations

W. W. Nevison, for the plaintiffs in error.

A. C. Harding and A. F. Martin, for the defendant in error.

²⁷⁷ **DOSTER, C. J.** Grant and Ann Renfrow were colored persons living in the state of Missouri. They married each other in 1852 according to the ordinary form of marriage agreement and ceremony. This marriage did not confer upon them any legalized matrimonial status or relation. It was not deemed illegal or immoral by the law then obtaining, but it did not constitute them husband and wife. "It was an inflexible rule of the law of African slavery wherever ²⁷⁸ it existed that the slave was incapable of entering into any contract, not excepting the contract of marriage": Hall v. United States, etc., 92 U. S. 27. "Marriage is based upon contract; consequently, the relation of man and wife cannot exist among slaves. It is excluded, both on account of their incapacity to contract, and of the paramount right of ownership in them as property": Howard v. Howard, 6 Jones, 235. To the same effect is Johnson v. Johnson, 45 Mo. 595. As presently more particularly stated, the persons named lived together as husband and wife until 1868. Missouri was not within the insurrectionary portions of slaveholding territory over which the emancipation proclamations of September 22, 1862, and January 1, 1863, operated. Slavery continued to exist there until abolished, January 11, 1865, by ordinance of the constitutional convention of that state: Mo. Gen. Stats. 1889, p. 63. After the passage of this ordinance, and on February 20, 1865, the legislature of Missouri enacted the following statute:

"That in all cases where persons of color heretofore held as slaves in the state of Missouri have cohabited together as husband and wife, it shall be the duty of persons thus cohabiting to appear before a justice of the peace of the township where

they reside, or before any other officer authorized to perform the ceremony of marriage, and it shall be the duty of such officer to join in marriage the persons thus applying, and to keep a record of the same.

"Free persons of color living or cohabiting together as husband and wife without being married according to the provisions of this act shall, after twelve months from its passage, be liable to criminal prosecution and subject to the same penalties as now provided by law; provided, however, that this section shall not extend to colored persons who have enlisted in the service of the United States or state of Missouri, who shall not be subjected to any penalty for its violation until ²⁷⁹ six months after their discharge from said service": Mo. Sess. Laws 1865, p. 68.

The Renfrows never complied with the provisions of this law. In disregard of it they continued to live together until 1868, in which year Grant abandoned Ann, declaring his intention no longer to recognize her as his wife. Thenceforth he never did recognize her as such, but several times thereafter married other women, by some of whom he had children. Throughout the time intervening between his emancipation from slavery and his separation from Ann they lived together in Missouri as husband and wife, mutually recognizing and holding each other out in the face of the world as such. Grant Renfrow moved to Kansas, accumulated here a small amount of property, and died. This action was instituted by his first wife, Ann, in assertion of her rights as his widow to a division of the property left by him. To this action his children and his last wife, Medora, were made defendants. Upon the facts above summarized judgment was rendered against them, and they prosecute error to this court.

It is admitted by counsel for plaintiffs in error that consensual or common-law marriages are and at the dates above mentioned were recognized as valid in the state of Missouri. It is, however, insisted that the above-quoted Missouri statute disqualified persons of color from contracting marriage according to the common law. It is insisted that the penal provisions of this statute excluded such class of persons from the operation of the common law of consensual marriage, and rendered ineffectual and void all agreements of marriage by such persons which were not solemnized according to its provisions. The plaintiffs in error are mistaken. The statute in question does not pretend to operate upon the marriage status. It ²⁸⁰ does not pretend to annul or forbid the marriage relation because

not entered into in accordance with prescribed forms. It only provides penalties for noncompliance with certain ceremonies of solemnization. It is in effect like the statute of this state discussed in *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, in which it was held that "punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements without rendering the marriage itself void." The general doctrine is, that a marriage good at common law is good notwithstanding the neglect of statutory forms relating to the subject, unless the statute itself contains express words of nullity because of the failure to conform to its requirements: 1 Bishop on Marriage and Divorce, 5th ed., sec. 283; *Meister v. Moore*, 96 U. S. 76. The statute, it will be observed, makes it the "duty" of colored persons to solemnize their marriage agreement before an officer, but it does not abrogate the marital relation as a penalty for the violation of its provisions.

It is also insisted that the facts stated do not show the existence of a consensual or common-law marriage between Grant and Ann Renfrow, because no express agreement between them to take and live with each other as husband and wife was shown to have been made at any time between their emancipation from slavery and their separation three years later, without which agreement it is contended that such kind of marriage cannot exist, or, to state the contention of the plaintiffs in error more accurately, cannot be proved. It is true the making of such agreement was not shown, but it does not follow that legal proof of the marriage was lacking. If a marriage contract need not be evidenced by writing, and of course it ²⁸¹ need not be, we can conceive of no reason why it may not, like many other civil contracts, be evidenced by acts and conduct from which its making ore tenus may be presumed. The acts and conduct of Grant and Ann Renfrow, after the removal of their disabilities, were in recognition of each other as husband and wife, and were continued for a sufficient length of time and with such openness to the world as to estop either from claiming to the contrary and to establish for themselves the marital status in the community where they resided. In the case of *Francis v. Francis*, 31 Gratt. 283, the same contention was made before the court of appeals of Virginia, in the case of a colored man and colored woman, as the plaintiffs in error make before us in this case. In the opinion of the court in that case it was said: "It must appear that they have agreed to occupy that relation. The fact that they

have so agreed is, however, not always susceptible to direct proof. The courts must, in many cases, infer it from the circumstances. It is not necessary that the parties shall have expressly agreed to live together as husband and wife. The agreement or understanding may be implied, as in other cases, from their conduct and declarations. In the present case there is no positive proof of an express agreement of the appellant and the appellee to occupy the relation to each other of husband and wife. But the circumstances tending to show an implied understanding of that sort are almost as satisfactory as the direct testimony of unimpeached witnesses to the fact."

The facts involved in *McReynolds v. State*, 5 Coldw. 18, were identical with those now under consideration, and in that case the court held that after the living together of a slave man and woman as husband and wife, a mutual recognition by them of each other in that relation, after the removal of ²⁸² their disabilities by emancipation, constituted a consensual marriage.

The plaintiffs in error urge some matters of conduct upon the part of Ann Renfrow toward her husband Grant as equitable reasons for refusing her recognition as his widow, and for disallowing her a share of his estate. They are not, however, sufficient to prevent the operation in her favor of the rules of law we have announced, and the judgment of the court below will be affirmed.

IN THE CASE of *Shorten v. Judd*, 60 Kan. 73, the question was presented as to what was sufficient to constitute a marriage good at common law, and it was there decided that an agreement and present consent between parties then capable of agreeing and consenting to take each other as husband and wife, followed by cohabitation, was sufficient to constitute a valid common-law marriage. The following cases were there cited in support of this rule: *State v. Hughes*, 35 Kan. 626, 57 Am. Rep. 195; *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556; *State v. McFarland*, 38 Kan. 667.

MARRIAGE AND DIVORCE—STATUTORY RESTRICTIONS—COMMON-LAW MARRIAGE.—A statute providing for the procurement of a marriage license and the other formalities to be observed in the solemnization of marriage does not render void marriages entered into according to the common law, but not in conformity to such formalities, unless the statute itself declares them so: Note to *State v. Zichfeld*, 62 Am. St. Rep. 810. In California, in order to constitute a valid marriage, the laws require a solemnization in the mode and by the persons specified in its Civil Code: *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74.

MARRIAGE AND DIVORCE—PROOF OF MARRIAGE.—Circumstantial, as well as direct, evidence may be considered by a jury in support of an alleged marriage: *Jenkins v. Jenkins*, 83 Ga. 283, 20 Am. St. Rep. 316; *Camden v. Belgrade*, 75 Me. 123, 46 Am. Rep. 364.

JONES v. DAVIES.

[60 KANSAS, 309.]

PARTNERSHIP IN REAL ESTATE.—If several persons purchase real estate as a speculation, they become partners, and the mere fact that the title was taken in the name of one of them, who executed a mortgage for the unpaid purchase money, cannot change the relationship of the parties or the ownership of the property.

PARTNERSHIP—ESSENTIALS.—Neither articles of partnership nor written contracts defining the interests, rights, and obligations of the parties are essential to the existence of a partnership.

PARTNERSHIP IN REAL ESTATE.—If persons join together and purchase land for the purpose of sale and profit only, the land must be regarded in equity as personal property and the statute of frauds has no application to the transaction.

PARTNERSHIP IN REAL ESTATE.—If persons join together and purchase land for the purpose of sale and profit only, it is immaterial in whose name the purchase is made or the title taken, as in such case the property is to be deemed to be partnership property, and the parties are entitled to the rights and subject to the liabilities of partners.

PARTNERSHIP MAY EXIST FOR A SINGLE VENTURE or undertaking, such as the purchase of land for speculation.

PARTNERSHIP IN REAL ESTATE.—If several persons purchase land for the purpose of sale and profit only, and they have a community of ownership, power, and profit and loss, they must be treated as partners, no matter what they call themselves.

PARTNERSHIP IN REAL ESTATE—LIABILITY OF INCOMING PARTNER.—If several persons purchase land for the purpose of sale and profit only, and one of them sells his share to an outsider, who, with full knowledge, contributes to the payment of interest on the unpaid purchase money, and also to taxes and incidental expenses, and shares in the proceeds of sales, he is liable as a partner for the payment of the unpaid purchase money due on the land.

Troutman & Stone, for the plaintiff in error.

A. Bergen, for the defendant in error.

310 **JOHNSTON, J.** In this action the plaintiff sought to charge Benjamin M. Davies as a partner and to recover an alleged partnership liability of \$9,507. It appears that on November 15, 1886, W. E. Swift, F. E. Holliday, A. P. Bowman, Joseph Freeman, and A. B. Quinton purchased from Jacob Skillman for speculation and profit four lots in the city of Topeka for the sum of \$14,000, making a cash payment of \$3,000, leaving \$11,000 to be paid in four installments of \$2,750 each. No partnership articles or written contract were made between the purchasers, but it was agreed that Swift and Holliday each held a one-fourth interest, and that each of the remaining parties held a one-sixth interest. On this basis each of the parties contributed his share to the cash payment of \$3,000, and the understanding between

them was that, on all other and further payments of purchase price, interest, taxes, and other incidental expenses, each of the parties was to contribute according to his respective interest, and that all profits that might be realized from a sale of the lots or any part of them should be divided among them according to the respective interest of each. For convenience it was mutually agreed that a deed from Skillman should be taken in the name of one of the partners, W. E. Swift, and that Swift and his wife should execute a mortgage on the property to secure the deferred payments.

³¹¹ It was understood that any of the parties could sell or transfer his interest in the adventure without consulting the others, and upon the transfer of an interest it was the practice of W. E. Swift to give a statement or certificate that such interest had been transferred. On December 28, 1887, Davies purchased the interest of Quinton, and at the time of the purchase Swift gave Davies a certificate to the effect that Davies was the owner of a one-sixth interest in the lots, describing them, and that they were taken subject to a like proportion of the \$11,000 encumbrance on them. After that time the other parties recognized Davies as the owner of the Quinton share, and he contributed from time to time his pro rata share of the taxes levied against the property, and also his share of the interest accruing upon the unpaid purchase money which was secured by the Swift mortgage. Quinton purchased the share of Freeman, and was thereby continued as a party in the venture. After Davies purchased an interest in the enterprise, a sale of the lots was made for \$24,000, and a cash payment of \$3,000 was then made, but, the purchaser failing to pay the balance of the purchase price, his rights under the contract were forfeited. The cash payment of \$3,000 was received by Swift and Holliday, who acted for all the parties in collecting and disbursing the funds in connection with this enterprise, and, after paying certain expenses, the balance of the \$3,000 was divided among the parties, and Davies accepted and appropriated his share of that fund. An offer of \$18,000 for the lots was made, but this offer the parties interested refused.

The parties continued to pay the taxes and other expenses incidental to the enterprise up to and including the year 1892, but afterward default was ³¹² made in the payment of the interest and purchase money, and an action of foreclosure was begun against W. E. Swift and wife. On motion of Swift, his

associates, Holliday, Bowman, Quinton, and Davies, were brought in as defendants, Swift alleging that they were all partners in the enterprise, and that each was liable as a partner for the unpaid purchase money for which the action was brought. Personal service was obtained on Holliday and Quinton, and a judgment against them for the full amount of the purchase money was rendered, but Davies and Bowman, being nonresidents, were only served by publication, and hence no personal judgment was rendered against either of them. Under the foreclosure this property was sold for \$2,000 and credited upon the judgment rendered in that case, and in September, 1895, Swift and Holliday paid to the plaintiff the sum of \$5,000, and were thereby released from any further liability on the judgment rendered in that case. It does not appear that the parties interested in the original purchase of the lots in question ever at any other time purchased or held any other property than these lots. Upon the facts the trial court held that the enterprise did not constitute a partnership, that the parties in interest owned the lots as tenants in common, and that there was no liability on the defendant Davies.

The material facts in the case are not in dispute, and the question is presented here whether the joint adventure of these parties amounted to a partnership, and whether the defendant is liable as a partner. These questions are answered by the facts, and not much, if any, argument is required to show that all of the essential elements of a partnership were present in this business undertaking. The property was purchased for speculation and profit, and the purchasers ³¹³ who associated themselves together as a unit were the joint owners of the same. No one of them owned any particular part of the lots exclusive of the others, but each had an interest in the whole in common with all the others. Although only engaged in the single business undertaking, the property was not purchased as a permanent investment or for improvement, but the enterprise was formed and carried on to buy and sell real estate for profit. As to this enterprise the parties were united as an entity; together they owned property which was the substratum of their business relation, and the agreement was that they were to divide the expenses and share the profits to be derived from trading in this property. The mere fact that the title was taken in the name of one of the parties, who executed a mortgage for the unpaid purchase money, cannot change the relationship of the parties

or the ownership of the property, as he was no more than a trustee holding the title for the convenience and benefit of all interested parties.

It is true that there were no articles of partnership nor written contract defining the interests, rights, and obligations of the parties, but they are not essential to the existence of a partnership. In a somewhat similar case, where two joined in the purchase of a tract of land with a view of selling the same for profit, it was held to be a partnership transaction, and the court said: "In such cases, real property may usually be considered in nearly the same manner as personal property, and the real intention of the parties with reference thereto, their contracts, promises, or mutual understandings, will govern, without reference to whether they have been reduced to writing or not": *Tenney v. Simpson*, 37 Kan. 363.

In that case the court adopted the view that where ³¹⁴ parties join together and purchase land for the purpose of sale and profits only, and not for permanent use, it will be regarded in equity as personal property, and that in such cases the statute of frauds has no application. It is there held that in such cases it is immaterial in whose name the purchase is made or the title taken; that the property, wherever the legal title may be placed, will be deemed partnership property, and the parties entitled to the rights and subject to the liabilities of partners. It is not necessary that there should be a series of transactions nor that the relationship between the parties should continue a long time to constitute a partnership. It may exist for a single venture or undertaking. If there be a joint purchase with a view to a joint sale on joint account and a communion of profit and loss, it will ordinarily constitute a partnership transaction: *Stettauer v. Carney*, 20 Kan. 474; *Tenney v. Simpson*, 37 Kan. 363, *Tenney v. Simpson*, 37 Kan. 579; *Simpson v. Tenney*, 41 Kan. 561; *Yeoman v. Lasley*, 40 Ohio St. 190; *Hulett v. Fairbanks*, 40 Ohio St. 233; *Kayser v. Maugham*, 8 Colo. 232; *Morse v. Richmond*, 97 Ill. 303; *Lindley on Partnership*, 49.

Nor is the fact that these parties did not call themselves a partnership a controlling one in determining their relations to each other and to third persons. Their understanding and their conduct, as stated and found by the court, when measured by the ordinary tests of partnership, clearly indicate that the original parties to the transaction occupied the relation of partners.

There was a community of ownership of the property, community of power in the management of the business, and community of interest in the profits and losses arising from the undertaking. When taxes were to be paid or interest became due, or ^{§15} other incidental expenses of the undertaking were to be met, a fund was collected by one of the partners from all, and all shared in the fund arising from the sale of the property, and when the motion was made to bring them into the foreclosure proceeding and charge them as partners, those upon whom personal service was had appeared but did not combat the averment and claim that it was a partnership transaction.

It is strongly urged, however, that even if the original parties are deemed to be partners, Davies cannot be regarded nor held liable as a partner. The claim is, that if he is an incoming partner there is no such assumption of the indebtedness of the partnership as will make him liable for the same. We are unable to see, however, that he occupies any different or better position than the other partners. It is evident that he was substituted for the retiring partner with the consent of the remaining partners, as he was recognized by them as having taken the place of Quinton, whose interest in the adventure he had purchased. He had full knowledge of the transaction, knew the amount for which the real estate was purchased, the amount that had been paid on the same, and the amount that still remained unpaid. By becoming a member of the partnership he made himself liable as a partner, and while it may be said that an incoming partner does not by the mere fact of joining the firm become liable for its prior debts, yet the case in hand is not like the ordinary debt of a general mercantile partnership. Here there was a single partnership transaction, a single contract, and the defendant could not identify himself with the firm and buy into the partnership contract without making himself liable for the obligations of that contract. When he joined the firm he made himself a part of an existing entity. ^{§16} The transaction was an entirety, and he could not acquire an interest in the property and in the partnership transaction without sharing in the obligation which formed a part of the contract. In other words, he cannot reap the benefits of the transaction and repudiate its burdens.

Very little testimony is sufficient to show that an incoming partner like the defendant makes himself liable for such an indebtedness: *Cross v. National Bank*, 17 Kan. 337. For five years

Davies contributed to the funds raised for the purpose of paying interest, taxes, and other expenses in the same way that the other partners did. He knowingly contributed to the payment of interest during that time on the unpaid purchase money, and thereby adopted the debt as his own as fully as could have been done. His conduct during this long period of time and the conceded facts in the case leave no opportunity to distinguish him from the other partners or except him from the liabilities chargeable against them.

The judgment of the district court will therefore be reversed, and the cause remanded, with direction to enter judgment against defendant for the amount of the indebtedness remaining unpaid.

PARTNERSHIP IN REAL ESTATE—TITLE IN NAME OF ONE.—If the title to real property is vested in one partner only, when the circumstances of its acquisition were such that it equitably belongs to the firm, the partner in whose name the conveyance has been taken holds the property as partnership assets to the same extent as if the conveyance had named all the partners as grantees therein: *Extended note to Goldthwaite v. Janney*, 48 Am. St. Rep. 64.

PARTNERSHIP.—WHAT CONSTITUTES: See *Spaulding v. Stubbings*, 86 Wis. 255, 39 Am. St. Rep. 888.

PARTNERSHIP IN REAL ESTATE—TREATED AS PERSONALTY.—The real estate of a partnership is subject to the same rules as its personal property. In equity and for partnership purposes it is treated as personalty. It is immaterial in whom the legal title is vested: *Note to Darrow v. Calkins*, 61 Am. St. Rep. 644.

PARTNERSHIP IN REAL ESTATE—PAROL AGREEMENT.—The general rule is as stated in the principal case, that a partnership may be formed by parol to deal in real estate. There is respectable authority to the contrary, however: *Seymour v. Cushway*, 100 Wis. 580, 69 Am. St. Rep. 957, and note.

A PARTNERSHIP MAY EXIST IN A SINGLE TRANSACTION of purchasing land with a view of selling it for profit: *Spencer v. Jones*, 92 Tex. 516, 71 Am. St. Rep. 870.

PARTNERSHIP—LIABILITY OF INCOMING PARTNER.—One who buys out the interest of one of the members of a partnership, and forms a new partnership with the remaining members, is not liable at law or in equity for debts previously contracted, unless he agrees to pay them: *Poindexter v. Waddy*, 6 Munt. 418, 8 Am. Dec. 749; *Love v. Payne*, 73 Ind. 80, 88 Am. Rep. 111.

ANTHONY v. NORTON.

[60 KANSAS, 341.]

SEDUCTION—WHAT NECESSARY TO MAINTAIN ACTION.—An action for seduction may be maintained upon the mere relation of parent and child alone, even in a case where the daughter is of full age, lives with her parent, and constitutes a part of the family.

SEDUCTION—ABOLITION OF COMMON-LAW FICTION.—The common-law rule, in actions by a parent for damages for seduction of a daughter, requiring suit in the capacity of master for the loss of her services as a servant, was the rule of a legal fiction no longer obtaining under the reformed procedure.

SEDUCTION—WHAT NECESSARY TO MAINTAIN ACTION.—In Kansas, a parent may maintain an action for the seduction of a daughter without averment or proof of loss of service or expense of sickness, and the mere fact of the emancipation of the daughter from parental control or the fact of her becoming of age does not affect the right to maintain the action.

Madden Brothers, for the plaintiff in error.

G. E. Manchester and Lamb & Hogueland, for the defendant in error.

342 **DOSTER, C. J.** This was an action brought by Mrs. F. M. Norton, a widow, against O. L. Anthony, for damages for the seduction of her daughter, Turie Norton. Besides a denial of the imputed act, the defense was that the daughter was of full age, and did not, as to her mother, stand in the relation of a servant to a mistress, and that no loss of service to the mother, as mistress, had resulted from the alleged wrong. The daughter was about twenty-five years old at the time of the seduction charged, and was clerking in a store. At and before that time she lived with her mother as a part of the family, and occasionally performed some slight household services. The court, among other matters of law, instructed the jury as follows: "If you find from the evidence that the plaintiff is a widow, and the mother of Turie Norton, whom it is alleged that the defendant seduced, and that, at the time of said seduction, the said Turie Norton lived with her mother and performed service for her (and you are instructed that the performance of any slight service is sufficient to satisfy the law in that regard), then plaintiff will be entitled to recover, if you find that the seduction was accomplished as alleged. That you may find that the said Turie Norton was in the service of the plaintiff, you need not find that a contract existed between them for such service. It will be suffi-

cient if she lived with her mother when the seduction occurred, and took part in the housework. And such service need not be paid for, and no pay need be promised or expected."

A request made by the defendant for the following instruction was refused: "I instruct you that the mere relation of mother and daughter will not permit a recovery by the former for the seduction of the latter."

²⁴³ The instruction given is in accord with the almost unanimous voice of the courts, and if it were the only one to be considered we should have no hesitation in approving it; but the request preferred by the defendant and refused by the court brings before us the question as to whether an action for seduction can be maintained upon the mere relation of parent and daughter alone, especially where, as in this case, the daughter is of age and lives with her parent and constitutes a part of the family. Upon this question the holdings of the courts are uniform to the effect that an action for the seduction of a daughter, brought in the parental capacity alone, is not maintainable, except as allowed by statute. At common law, the action is maintainable by the parent only in the capacity of master or mistress, and it must be in form an action for loss of the daughter's services as a servant. That the rules of the law should thus degrade the injured parent's right of action to one of mere compensation for the impaired ability of the daughter to perform labor, and for the recovery of the expenses incident to such sickness as results from the wrong done, has been, throughout the course of judicial decision, a matter of regret among the judges. So grievously has this reproach upon the law been felt, that the courts quite a time ago began to sanction a wide latitude of evidence as to damages in such actions, until now the rule has become firmly established that, notwithstanding the action must be in form for loss of services and expenses incurred in sickness, compensatory damages for parental, and even general, family shame and mortification may be recovered, together with an additional punitive sum for the flagrant wrong committed by the seducer. It will be profitable at this point to illustrate by quotations ²⁴⁴ from the authorities the present liberal holdings of the courts upon this subject, and to note the extreme departure of the rule of proof from the rule of pleading, and also to note the lament of the judges over the arbitrary and technical theory which compelled the parent to disguise his action in the false and abhorrent form of a master's suit for loss of services.

Mr. Sedgwick, in his work on Damages, eighth edition, volume 2, section 471, says: "The common-law action of case, by the father or mother, for seducing a daughter or female servant, is one of a peculiar character. It is eminently a legal fiction; the demand is based upon the mere loss of service; but the damages are very much at large, and in the discretion of the jury." Following the above statements the author briefly traces the evolution of the rule of damages from one of mere compensation to the master for loss of services to one of compensation for parental mortification, anguish, and violated honor.

In Sutherland on Damages, volume 3, page 735, it is said: "At common law, this action rests on the relation of master and servant, and proceeds in form for loss of service. Trespass vi et armis is deemed the proper action where the servant resides with the master or parent; case may also be brought where the injury is not committed with force or where the servant is only constructively in the master's service. Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages. The allegations and proof on these points are almost an unmeaning formula—an obeisance to a shadow of the past—to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative or person standing in loco parentis for the dishonor and degradation suffered by the family in consequence of the seduction. And large ³⁴⁵ damages, which the court will seldom relieve against, are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: "Technically, the ground of recovery is the loss of the services of the daughter, and the rule of the books seems to be that the father must prove some service in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while, practically, the right to recover rests on far higher grounds—that is, the relation of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages. But the law may still require proof of service, or at least the right to service when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render ser-

vice to the plaintiff, and the most trivial service has always been held sufficient': *Doyle v. Jessup*, 29 Ill. 462. Even in England, where stricter proof of service is required, Blackburn, J., said: 'In effect, the damages are given to plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant, beyond the mere technical point on which the action is founded': *Terry v. Hutchinson*, L. R. 3 Q. B. 602. This is according to the general current of authority. While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction, they do not require very strict proof; very slight evidence of loss of service suffices in favor of one standing in loco parentis, and affected by the graver consequences of the seduction. The actual loss sustained by the plaintiff, through the diminished ability of his daughter, relative, or ward to yield him personal service, as well as the servile position of the supposed servant herself in the family of her protector, is ordinarily ³⁴⁶ little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one, by the aid of the discretion which courts have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their so doing."

In Pollock on Torts, 201, it is said: "The capricious working of the action for seduction in modern practice has often been the subject of censure. Thus, Sergeant Manning wrote forty years ago: 'The quasi fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers.' All devices for obtaining what is virtually a new remedy by straining old forms and ideas beyond their original intention are liable to this kind of inconvenience. It has been truly said that the enforcement of a substantially just claim 'ought not to depend on a mere fiction over which the courts possess no control.'"

In *Phelin v. Kenderline*, 20 Pa. St. 361, the court says: "Although the action by a parent for the seduction of his daughter has its technical foundation in the loss of his daughter's services, it is well settled that proof of the relation of master and servant, and of the loss of service by means of the wrongful act of the

defendant, has relation only to the form of the remedy, and that the action being sustained in point of form by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also for 'all that the plaintiff can feel from the nature of the injury.' "

In *Badgley v. Decker*, 44 Barb. 588, the court says: "The rule is still adhered to with us, that the loss of service is the legal gravamen of the action (*Bartley* ³⁴⁷ v. *Rightmyer*, 4 N. Y. 38, 53 Am. Dec. 388), but to accommodate the action to cases where the daughter rendered no service, a presumed or a fictitious service is resorted to as the gravamen: *Butler v. Heathby*, 3 Burr. 1893; *Bennett v. Allcott*, 2 Term Rep. 166, 168; *Hallowell v. Abell*, 7 Car. & P. 528; *Martin v. Payne*, 9 Johns. 389, 6 Am. Dec. 288; *Clark v. Fitch*, 2 Wend. 459, 20 Am. Dec. 639; *Hewitt v. Prime*, 21 Wend. 79-82. All the modern cases hold that the legal gravamen of the action is not the real gravamen, as is apparent when we come to consider the rule of damages recognized in the action, and judges have not unfrequently spoken of the action as resting upon a fiction. . . . The real gravamen of the action is not the loss of service; that is a very small item in the measure of damages. The loss of service in many cases could not be considered anything in reality, and often when the least service is performed the highest damages are given. The real gravamen of the action is the mortification and disgrace of the family and the wounded feelings of the plaintiff."

In *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767, the court says: "The action in form is to recover damages for loss of service; but it has become well settled for a century in England and this country that the loss of service is slight and nominal in most cases, and the recovery is had essentially for wounded feelings, dishonor, and disgrace."

In *Riddle v. McGinnis*, 22 W. Va. 271, the court says: "While at common law the father and master was obliged to allege and prove the loss of service, however trivial or valueless, as the foundation of the recovery, yet it was regarded only as the foundation, for the courts have always treated the relation of master and servant and the loss of service as innocent fictions which merely served to give the court jurisdiction, while the measure of the plaintiff's damages was not merely the actual value of the service lost, but compensation for the shame, disgrace, and anguish suffered by the father in the defilement and ruin of his

daughter. These elements now enter into and generally constitute the real measure of damages, while ³⁴⁸ the jury in estimating them must almost necessarily be influenced and controlled by the position of the parties in society and by all the other circumstances surrounding each particular case."

Many more quotations like those above could be made from text-writers and reported decisions. The views of all legal authorities upon the subject are to the effect that the rule which requires a parent suing for the seduction of a daughter to plead loss of her services as his servant, but which obligates him to only nominal proof of the cause of the action stated, is an empty and senseless legal fiction, a pretense and a sham, which does discredit to the law, and with which it is highly desirable to dispense.

What seems to us a satisfactory definition of a fiction of law, though one admittedly broad, is that given in Maine's Ancient Law, page 25. It is: "Any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. . . . The fact is, that the law has been wholly changed. The fiction is, that it remains what it always was." The substance of all the definitions of a legal fiction is that it is a pretense that the law as to a particular matter is different from what it really is.

The legal fiction in actions by a parent for seduction is that he has lost the services of his daughter and has been subjected to expense on her account, wherefore he sues for such loss and expense, and for them alone. The fiction assumes his right to recover for these and these alone. The fact is, that he has lost no services and has been subjected to no expense, but the law is that, notwithstanding his lack of loss and expense, he may nevertheless recover for the wounds to his parental feelings, and may ³⁴⁹ mulct the seducer in punitive damages also. We say the law is that he may recover notwithstanding his lack of loss in his capacity as master. The courts make a pretense of holding him to proof of such loss, and make a pretense of withholding relief if he fails to make the proof; but it is a pretense only. Proof of the very slightest kind of service will suffice. The service proved need be nothing more than nominal. It need not be actual or beneficial; and many of the courts hold that where the daughter was not actually in the service of the parent she nevertheless was, if a minor, constructively in his service, and

that such constructive service was sufficient to uphold the right of action. It is a shameful pretense to hold that a daughter whose labors, for instance, merely consist in pouring the tea at her father's table and doing the honors of his household to his guests, is in his service as a servant, and that he may recover damages because of the loss of such labors through her seduction.

Many of the courts have deplored the lack of legislation to enable them to dispense with the fiction in question, so as to allow them to bottom cases in theory as well as in fact upon the actual and meritorious ground upon which the damages are really awarded. If by this is meant legislation which in express terms abrogates the fiction of the relation of master and servant, we deny its necessity in this and other states which have adopted the reformed code of procedure. The code was devised for the very purpose of dispensing with legal fictions and antiquated forms of action. Its spirit in this respect can be illustrated by a score or more of its provisions. Out of them one general rule of reform is collectible, and that is that the actual facts from which the claimed right of action is deducible must be stated. Nay more, it is ³⁵⁰ even expressed in some of the sections of the code. "The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished": Code, sec. 6. "There can be no feigned issues": Code, sec. 7. "The rules of pleading heretofore existing in civil actions are abolished": Code, sec. 85. "The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition": Code, sec. 87. "All fictions in pleadings are abolished": Code, sec. 116.

If in fact a right of action is given to the parent as such for the seduction of the daughter; if in fact the injury done is to the parent in that relation; if in law the courts take to themselves the right to probe beneath the thin veneering of the form of the action as one for the loss of services, in order to reach the heart and core of the controversy and give damages for the actual injury committed—if these things are allowed and done, it cannot be that the liberal rules of the code still require conformity to the fictitious and embarrassing formulas of the common law. Not only was it the design of the code to simplify the rules of pleading by reducing to unity all the various forms of action existing at common law and requiring the parties to state the

actual facts of the controversy, but it contemplated the existence of the modern and enlarged ideas of justice as to matters of substantive right which had begun to prevail. To furnish a better medium for the working out of the newer and more equitable thought was equally its design.

No relation in life has been more visibly affected by the humanizing influence of latter-day concepts of justice than has the domestic one. Originally, the child was in the fullest sense the slave of its father. Indeed, the origin of slavery, according to the view of ³⁵¹ a most learned and deep-searching historian, was in the family circle; the child was born into slavery to its sire: Ward's Ancient Lowly, c. 2, 3. In the course of time the legalized state of the child passed from that of a slave to that of a servant of the one who had begotten it. Now it holds, in general estimation at least, if not in law, a quite nearly co-ordinate position in the family. As long as its minority lasts it is under the guardianship and tutelage of its parents, but it is no longer in fact, nor in legal theory, their servant, and when, it being a daughter, suit is brought on account of its seduction, such suit is not in fact founded upon the idea of service lost, but upon the idea of parental affection wounded, parental anguish endured, and parental liability for care and nurture increased. Damages, therefore, in respect to the violated parental relation are the facts which the code ordains shall be stated in the petition, and the pretense of services lost to the parent as a master is the legal fiction of pleading which the code ordains shall be abolished. If necessity ever existed for cloaking the real cause of action under the nominal disguise of another one, it no longer exists, and we hold accordingly. In this state, a parent may maintain an action for the seduction of the daughter without averment or proof of loss of services or expenses of sickness.

A question subsidiary or incidental to the one above discussed now arises. In this case the daughter was of full age. The law had emancipated her from the guardianship and control of her mother, and, so far as legal liability is concerned, the mother was absolved from responsibility for the acts and conduct of the daughter. May the mother, therefore, maintain the action? As before stated, the daughter constituted in fact a part of the mother's family. The mother was the head of that family, and was charged with ³⁵² that moral responsibility for the virtue and orderly conduct of its various members which devolves upon the head of a household. The purity and rectitude of behavior

of those within the domestic circle were in an especial manner the objects of her solicitude and care. The law, therefore, will not deny compensation to her for the invasion of her home by the ruthless destroyer of its peace and happiness simply because, in law, she could no longer command the services of her daughter. The mere fact of the legal emancipation of the daughter from parental control has never been made a test of the right to maintain the action for seduction. When the right to maintain it was founded upon the legal fiction of loss of services, the cases divided themselves into two classes—one where the daughter was a minor, in which instance the right to the service was legally presumed; the other where the daughter was of age, in which instance proof of a contract of service was required, or in lieu thereof proof of facts from which it could be inferred. The right of action was given in the last-mentioned case as well as in the former, and the courts, although adhering in the last case, as well as in the former, to the fiction of the loss of services, nevertheless gave damages in vindication of the parental right and in amelioration of outraged parental feelings.

In *Badgley v. Decker*, 44 Barb. 577, and in *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767, the daughters were twenty-five and thirty-one years, respectively, at the times of their seduction. The actions were held maintainable in these cases, and in the following ones they were likewise upheld, although the females had passed the period of minority: *Sutton v. Huffman*, 32 N. J. L. 58; *Wert v. Strouse*, 38 N. J. L. 185; *Lamb v. Taylor*, 67 Md. 85; *Moran v. Dawes*, 4 Cow. 412; *Lipe v. Eisenlerd*, 32 N. Y. 229; *Villepigue v. Shular*, 3 Strob. 462; *Long v. Keightley*, 11 Ir. L. T. 77. Many other like cases might be cited, but these are sufficient to show that the minority of the daughter has never been held essential to the right of recovery by the parent.

There exists no reason for distinguishing between cases of minority and of full age of the daughter, and granting a recovery in the former while denying it in the latter, merely because the legal fiction of services lost, upon which they were formerly both prosecuted, has been cleared out of the way, and the right of recovery placed in law, as well as in fact, upon its real ground. There is no magic in the passing of a daughter's eighteenth birthday anniversary to relieve against parental solicitude and care, or parental anguish over her fall from virtue. At what time in the advancing age of a daughter the feel-

ings of parental mortification over such fall become sufficiently dulled and the sense of parental responsibility sufficiently weakened to reduce the damages to a nominal sum or to deny them altogether we need not concern ourselves. The law heretofore has set no time for the passing of parental feelings as to such matters into a condition of indifference, and we need not speculate as to it. Each case will depend upon its own particular facts and as to such facts the jury is the judge.

Two other claims of error are made. They are founded upon the court's instructions and its refusal of requests for instructions. One of them relates to the meaning of the word "seduction," and raises a question as to its legal definition; the other relates to the measure of damages recoverable. Both of them, however, are unfounded, and the judgment of the court below will be affirmed.

SEDUCTION—WHAT NECESSARY TO MAINTAIN ACTION—COMMON-LAW FICTION OF SERVICE.—The common-law rule was that an action for seduction was not maintainable upon the relation of parent and child, but solely upon that of master and servant: *White v. Nellis*, 31 N. Y. 405, 88 Am. Dec. 282. Where the daughter is over the age of twenty-one, the action may be maintained, if the relation of master and servant exists between the parent and child. The slightest acts of service are sufficient to constitute such relation: *Vossel v. Cole*, 10 Mo. 634, 47 Am. Dec. 136. The fact that a daughter over age continues to reside with her father is sufficient to presume that services are rendered so as to constitute the necessary relation as a technical ground for the action: *Extended note to Coon v. Moffett*, 4 Am. Dec. 404. It is well settled that this theory of loss of service is a mere fiction, and that very slight evidence on that point will suffice to maintain the action: *Extended note to Weaver v. Bachert*, 44 Am. Dec. 166. The tendency is to have the old idea of loss of service give way to the more refined and enlightened views of the social relation: *Stevenson v. Belknap*, 6 Iowa, 97, 71 Am. Dec. 392. The principal case goes farther than most of the cases on the subject.

THOMPSON v. BURGE.

[60 KANSAS, 549.]

LIMITATION OF ACTIONS—MINOR HEIRS.—An action of ejectment for the recovery of land sold by an administrator may be brought, under the Kansas statute, by one of the minor heirs of the deceased, within two years after the disability of infancy has been removed.

EXECUTORS AND ADMINISTRATORS—EVIDENCE OF JURISDICTION.—The issuance of letters of administration is *prima facie* evidence that the court issuing them had jurisdiction over the subject matter of the estate.

JUDICIAL SALES—DEFECT IN NOTICE—COLLATERAL ATTACK.—After confirmation of a judicial or probate sale, it can-

not be defeated or avoided by showing collaterally that there was a defect in the notices of sale.

JUDICIAL SALES—CHANGE OF PLACE OF SALE—CONFIRMATION.—The adjournment of a sale of land by an administrator from the courthouse door, where it is advertised to take place, to another place nearer the land, is a mere irregularity, which does not render the sale void, and which is cured by confirmation of the sale by the probate court.

JUDICIAL SALES—PROBATE SALES.—The strict rules applicable to tax sales cannot be applied to probate sales.

J. G. Slonecker and Parker & Hamilton, for the plaintiff in error.

W. R. Hazen, for the defendant in error.

552 SMITH, J. At the time the land was sold the plaintiff below was a minor about four years of age. This action was commenced within two years after she reached her majority. We think a right of action was saved to her under section 11, chapter 95, of the General Statutes of 1897: Gen. Stats. 1889, par. 4094. Said section 11 refers to the five paragraphs composing section 10. The remedy sought in this action is mentioned in the second paragraph of said section 10.

The first assignment of error relates to the jurisdiction of the probate court. It is claimed that the failure of the petition for the appointment of an administrator to allege that the deceased, Samuel K. Thompson, was an inhabitant of Shawnee county or a nonresident of the state at the time of his death, did not confer jurisdiction upon the probate court to do any act in relation to the administration of the estate. Authorities are cited from other states which fortify the position of plaintiff in error on this question: *Moore v. Moore*, 33 Neb. 509. It is admitted, however, that Samuel K. Thompson was, in fact, an inhabitant of Shawnee county at the time of his death. In *Brubaker v. Jones*, **553** 23 Kan. 411, this court, speaking through Mr. Justice Valentine, said: "The statute does not anywhere prescribe how the jurisdictional facts shall be ascertained; hence the probate court may ascertain them as best it can; and if it ascertain them correctly, that is all that is required. All that is really necessary is that the jurisdictional facts shall exist as facts; and how the court ascertains them is wholly immaterial. And, when the court ascertains these facts and makes the appointment, the letters of administration are themselves prima facie evidence of such facts."

The probate court ascertained the fact that the deceased

was an inhabitant of Shawnee county at the time of his death, and the issuance of letters of administration will be taken as prima facie evidence that the court had jurisdiction over the matter. The question raised by plaintiff in error does not longer admit of debate in this state.

When the petition to sell the real estate was presented, the court set the hearing for the ninth day of August, and ordered that notice of the same be given "by publication for two weeks prior to said ninth day of August." The first publication of the notice was on July 29th and the last on August 5th. It is contended that, because only eleven days elapsed between the first publication and the day of hearing the petition, the order of sale was void. Section 118, chapter 107, of the General Statutes of 1897 (Gen. Stats. 1889, par. 2902), relating to proceedings in the probate court for the sale of lands of decedents, reads: "The court shall require notice of the petition, and of the time and place of hearing the same, to be given for such length of time and in such manner as the court may see proper." The court had, under this section, full authority and discretion to fix the time of the notice as ⁵⁵⁴ he saw fit, and in doing so he was nowise restricted by law. The defect in the notice must have rendered the proceedings void in order to avail the plaintiff. If merely voidable, the defects cannot be reached by this collateral attack. The sale of the real estate was confirmed by the court, and a deed issued to the purchaser. In Freeman on Void Judicial Sales, section 44, it is said: "As to the matters upon which a court is required to adjudicate in its order of confirmation, we see no reason why its decision should not be binding, and should not preclude the reassertion of any matter which was either passed upon by the court or which the parties might have had passed upon if they had chosen to bring it to the attention of the court. After a sale has been confirmed, it cannot be defeated by showing collaterally that there was a failure to appraise the property or a defect in the notices of sale, or that the administrator did not exact security for the payment of the purchase money, or that the commissioner who made the sale was not authorized to make it."

There is a wide distinction between cases where the notice is defective and where there has been no notice at all. In the latter the court is without jurisdiction to act: Bryan v. Bauder, 23 Kan. 95. In Fleming v. Bale, 23 Kan. 88, a petition was filed January 18th in the probate court for the sale of real estate

to pay debts of the deceased. It was ordered that the administrator cause notice of the pendency of the proceeding, and the time and hearing of the same, to be published in a newspaper for two consecutive weeks, and the hearing was set for January 29th. The notices were published on the 20th and 27th of January. The court held that this order meant that the publication should be made two consecutive times. The court says: "We do not think any of the foregoing irregularities or defects can vitiate the proceeding of the ⁵⁵³ probate court when attacked collaterally, as in this case": See, also, Wyant v. Tuthill, 17 Neb. 495. In Nebraska, the rule as to sheriffs' and administrators' sales is the same.

It is next contended that the sale of the real estate, having been advertised to be held at the door of the courthouse on September 11th, was void when held elsewhere at a subsequent time. The statute provides that the sale shall be made by auction at the door of the courthouse, or at such other place as the court may direct: Gen. Stats. 1897, c. 107, sec. 130; Gen. Stats. 1889, par. 2915. The court had power to fix the time and place of sale in the first instance at the place where and time when it was finally held. It ratified and confirmed the sale so made. It approved a sale made at a time and place which it had full power to fix in the original order. Mr. Freeman, in his work on Void Judicial Sales, section 44, says: "With respect to chancery and probate sales, we apprehend that their confirmation has an effect beyond that conceded in Kansas to the confirmation of execution sales. The object of the proceeding for confirmation is to furnish an opportunity for inquiry respecting the acts which have been done under the license to sell. The court may, if it deems best, ratify various irregularities in the proceedings. If the officer changed the terms of the sale, the court may ratify his action, provided the terms, as changed, are such as the court had power to impose in the first instance."

The strict rules applicable to tax sales cannot be applied to sales made under the supervision of the probate court. Tax sales are wholly regulated by statute, and no tribunal is created by law to direct or confirm them. They differ widely from sales ordered by a court of record. In Howbert v. Heyle, 47 Kan. 58, it is said: "It must also be remembered that the probate court ⁵⁵⁶ in this state is a court of record: Const., art. 3, sec. 8; Act Relating to Probate Courts, sec. 1; and, while it has jurisdiction only of particular classes of things, such as the care

of the estates of deceased persons, minors, and persons of unsound mind, yet it has general jurisdiction of these things. Hence all presumptions should be in favor of the regularity of all the proceedings of probate courts, within their jurisdiction, of the aforesaid particular classes of things, and such proceedings should seldom be held to be void when attacked collaterally, as in this case; never, indeed, except where it is shown affirmatively that the court had no jurisdiction."

In *Emery v. Vroman*, 19 Wis. 724, *689, 88 Am. Dec. 726, a guardian's sale of real estate was ordered by the probate court, in which order it was directed that certain other property should be first sold before resorting to real estate in controversy. The sale was confirmed. The court said: "The lands were not sold in the order of the license. This defect, if such it was, was cured by the order of confirmation. The same court from which the order emanated had, in its discretion, the power to modify it, or to dispense with its strict performance in the particular named. This was done by the order of confirmation": See, also, *Jacob's Appeal*, 23 Pa. St. 477; *Thorn v. Ingram*, 25 Ark. 52.

The sale of the property seems to have been fairly made, at a place near to the land in controversy, at a time when a public sale had drawn together a large number of persons. In fact, it appears that the place where the sale was held was much more favorable to the obtaining of a higher price than if the land had been sold at the door of the courthouse in Topeka. The complaint that the property was purchased by the auctioneer, J. Q. A. Peyton, who was an agent of the administrator, is without merit. The proof showed that ⁵⁵⁷ Hollensshade was the successful bidder at the sale, and that between the time of the sale and the execution of the deed Peyton arranged with Hollensshade for the purchase of one-half the property, and for convenience a deed was made by the administrator to Hollensshade and Peyton.

While there were irregularities in the proceedings of the probate court and in the action of the administrator which might have been sufficient in a direct attack thereon to have justified a setting aside of the sale, yet we find no such vital defects therein as to deprive the probate court of jurisdiction, and the sale having been confirmed by that court and the deed issued, the proceedings must stand as against a collateral attack of this nature. The judgment of the district court will be affirmed.

LIMITATION OF ACTIONS.—EFFECT OF INFANCY on the running of the statute of limitations: *Frost v. Eastern R. R.*, 64 N. H. 220, 10 Am. St. Rep. 396; *Grimsby v. Hudnell*, 76 Ga. 378, 2 Am. St. Rep. 46.

PROBATE COURT—JURISDICTION.—The jurisdiction of a probate court of Kentucky is presumed, *prima facie*, from its assumption and exercise: *Fletcher v. Sanders*, 7 Dana, 345, 32 Am. Dec. 96.

JUDICIAL SALES—COLLATERAL ATTACK.—If a petition filed in the probate court by an administrator asking for the sale of the decedent's land to pay his debts is sufficient to confer jurisdiction on the court to decree a sale of the lands for that purpose, such decree and a sale thereunder are valid as against collateral attacks, notwithstanding irregularities in the supervening proceedings: *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100; *McPherson v. Cunliff*, 11 Serg. & R. 422, 14 Am. Dec. 642; *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 420.

JUDICIAL SALE—CONFIRMATION—COLLATERAL ATTACK. As the order of a court of competent jurisdiction confirming a judicial sale has the effect of a final and conclusive judgment until set aside or reversed, such order cannot be collaterally attacked for any irregularity in the proceedings under which the sale was made: *Extended note to Watson v. Tromble*, 29 Am. St. Rep. 497.

JUDICIAL SALES—PLACE OF SALE.—Sales by an administrator must be made in the manner provided by law; and if made at a place and time other than those prescribed by the statute or decree, they are not only irregular, but void: *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313.

LEAVENWORTH ELECTRIC RAILROAD COMPANY v. CUSICK.

[60 KANSAS, 506.]

RAILROAD COMPANIES—STREET RAILWAYS—DUTY TO PASSENGERS.—A street railway company is bound to the observance of the highest possible diligence to protect the lives and insure the safety of its passengers, especially such as are physically diseased and infirm. It is bound to see that all passengers have alighted in safety from the car before starting again, and it is not sufficient to merely wait a reasonable time to enable passengers to alight without looking to see that this has been done, but it must see and know that all passengers intending to alight are safely off the car before starting again.

RAILROAD COMPANIES—NEGLIGENCE OF STREET RAILWAY IN STARTING CAR.—If a street-car is negligently started before a passenger attempting to alight therefrom has safely left it, and the passenger is then seized with an attack of dizziness preventing him from holding on, in consequence of which he falls off and is injured, the company is liable.

RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR ACT OF INTERMEDDLER.—If an intermeddler gives the signal to start a street-car, and the conductor in charge, without seeing and knowing that a passenger, who is attempting to alight, has safely alighted before the car starts, allows it to continue in motion in obedience to such unauthorized signal, he must be held to have ratified and adopted the act of such intermeddler, and the company is liable for an injury to a passenger caused thereby.

RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR NEGLIGENCE OF EMPLOYE.—If, by custom among street railway employes, those on duty call for and receive assistance from those off duty, and an employe off duty undertakes to render assistance thus asked, but negligently fails to perform it, whereby a passenger is injured, the company is liable therefor, whether it knew of such custom or not.

TRIAL—VARIANCE BETWEEN ALLEGATION AND PROOF—OBJECTION.—If evidence of additional injury and damages not alleged is received upon the trial without objection and after cross-examination, objection to it cannot be made for the first time by a request to instruct the jury to disregard it.

J. H. Atwood and W. H. Hooper, for the plaintiff in error.

Fenlon & Fenlon and B. F. Enderes, for the defendant in error.

502 **DOSTER, C. J.** This was an action brought by Bridget A. Cusick, the defendant in error, against the Leavenworth Electric Railroad Company, the plaintiff in error, to recover damages for injuries negligently inflicted upon her as a passenger on one of the defendant's cars. The case is brought to us upon the evidence, under a claim that such evidence fails to show negligence upon the part of the company and does show negligence upon the part of the defendant in error. The claim of negligence made in the petition was that, while the plaintiff was descending the steps of the car for the purpose of leaving it, the conductor negligently and without notice to her signaled the motorman of the car to go ahead, which signal was obeyed, the car started, and the plaintiff in consequence thrown from the car steps to the street. The evidence showed that plaintiff and her child were passengers on a south-bound car on Third street in the city of Leavenworth. She told the conductor, one Flora, to let her off at Pine street. As the car approached Pine street it was quite full of passengers. The conductor desired to occupy his time in collecting fares, and, in order to enable himself to do so, asked one Buckley to stop the car at Pine street and let the plaintiff and her child off. This Mr. Buckley promised to do. Buckley was a conductor on another car belonging to the company, and at the time in question was off duty, riding on Conductor Flora's car. It was the habit among conductors to assist one another in such cases. Conductor Flora testified: "Q. But as far as the management of the car was concerned, he [Buckley] was a stranger, wasn't he? A. Comparatively so. But still, it had been done on numerous 503 occasions. One conductor would help another one out."

Whether the company was aware of these frequent and friendly transferences of duty between its conductors and assented to them was not shown by the testimony. Buckley gave the signal to stop for Pine street, and left the car at that point in advance of the plaintiff and her child, without giving the starting signal. The plaintiff's child descended in safety from the car steps to the street, and the plaintiff herself went as far as the platform steps, when some unauthorized and unknown person gave the starting signal to the motorman. He obeyed it. The car started with the plaintiff on the steps. She grew dizzy, her head swam, she could not hold on to the platform railings, and because thereof, as she testified, fell to the street, sustaining the injuries for which she sued. The car had gone a quarter of a block, perhaps more, from the point of starting when the plaintiff fell. Conductor Flora supposed that Buckley had given the starting signal, and supposed that the plaintiff had safely alighted. Very soon after the car started he went out upon the rear platform, and finding her apparently about to leave the moving car directed her to wait for him to stop it. There is conflict in the testimony as to whether she jumped off or fell off. However, the jury having found in her favor upon this point, we are concluded by the finding.

Two claims of error arising upon the facts thus far stated are made. One is that the plaintiff's fall, according to her own testimony, was not caused by the premature starting of the car, but was caused by the attack of giddiness which overcame her and prevented her from holding on to the platform railings. It is argued that the plaintiff in error cannot be held responsible ⁵⁰⁴ for the consequences of sudden attacks of vertigo, or other like ailments, which disable people from maintaining their balance on its cars. As a reply to this, it is sufficient to say that it is fairly inferable from plaintiff's testimony, although not stated by her in direct terms, that the cause of her dizziness and inability to hold on to the car was its premature and sudden starting; but beyond this, and as a proposition of law, it is undeniably true that if the car was negligently started, the company is liable for such injuries as resulted from its negligence concurring with plaintiff's physical ailments or disabilities. To be subject to vertigo is not a fault. To be seized with an attack of it at a time when the defendant was performing a negligent act toward the plaintiff was not contributory negligence in the plaintiff. Street railway companies must have a care for the

physically diseased and infirm. They must know that some of such unfortunates are perhaps among their passengers, and they are therefore bound, like other railroad companies, to the observance of the highest possible diligence to protect the lives and insure the safety of such passengers: *Citizens' Street Ry. Co. v. Carey*, 56 Ind. 396. We do not mean to say that street railway companies must know of the latent infirmities of their passengers and regulate their own conduct and that of their employes accordingly, but we mean to say that general rules which will insure the safety of the possibly diseased and infirm as well as the healthy, alert, and active among their passengers should be observed, because they must know that their passenger customers belong to all classes. Among these rules is the obligation to see that passengers have alighted in safety from the car before starting again. ⁵⁹⁵ It is well expressed in *Anderson v. Citizens' Street R. R. Co.*, 12 Ind. App. 194: "There is a marked difference between the duties the law imposes upon those who operate street railways and those who operate ordinary steam railways. The latter usually run upon schedule time, and have fixed places for receiving and discharging passengers. There is a higher degree of care imposed upon street railways than upon ordinary steam railways. When their cars stop for passengers to alight, it is the duty of their servants to stop long enough for the passengers to alight, and to see that the car does not start again while anyone is attempting to alight or exposed to danger. Stopping a reasonable time is not sufficient, but it is the duty of the conductor or those in charge to see and know that no passenger is in the act of alighting or in a dangerous position before putting the car in motion again."

Of course, what is meant by the rule that stopping a reasonable time is not sufficient is, that assuming, without looking, that because a reasonable time has elapsed the passenger has safely alighted, is not sufficient diligence. Had the plaintiff been seized with dizziness while the car was standing waiting for her to alight, and she had in consequence fallen and been injured, no blame could attach to the company; but falling as she did from dizziness occurring while the car was negligently in motion, whether the dizziness was a consequence of its motion or otherwise, the company is liable for the resulting injuries.

Another claim of plaintiff in error arising upon the facts hereinbefore stated is that the premature starting of the car was the act of the unauthorized person who rang the bell and gave the

starting signal, and not the act of the company. The claim is, that it was the duty of the motorman to obey the starting signal; that he could not know that it had not been given by ⁵⁹⁶ the conductor, but was bound to assume that it had been given by him; that the conductor did not know that the signal had been given by an intermeddler, but was at liberty to assume that it had been given by Buckley, who had promised to stop the car and let the plaintiff off. A sufficient answer to this is that it does not appear that Buckley promised to do more than let the plaintiff off at Pine street. This, of course, implied the obligation to give the stopping signal, but it cannot be said to imply the obligation to give the starting signal; that is, it cannot, as a matter of law, be said to imply the obligation. If, therefore, Buckley's obligation to give the starting signal could not be implied from the agreement to stop the car and let the plaintiff off, the act of the intermeddler who did give it, being known to Conductor Flora and not repudiated by him, must be regarded as assented to and adopted by him. So adopted by him, it became his act—his negligent act.

We do not deny the legal doctrine advanced by counsel for plaintiff in error, which is that a railroad company cannot be held responsible for injuries to a passenger resulting from the act of an intermeddler which it could not foresee and guard against, but the facts of this case do not permit of its application. We will, however, for the purpose of meeting all phases of the contention of counsel for plaintiff in error, assume that Buckley's agreement to let the plaintiff off implied an obligation upon his part to give the starting as well as the stopping signal. He did not do it, but, after stopping the car, got off himself and left the remainder of his duty unfulfilled. Whose fault was this? If the custom among conductors to assist one another in exigencies such as the one under consideration, as testified to by Conductor Flora, was ⁵⁹⁷ known to the company and assented to by it, or not dissented from, Buckley then became by virtue of that authorized custom the company's servant for the purpose of starting the car again as well as stopping it. In other words, for the performance of that particular duty he became the company's agent to see that the plaintiff was safely off the car before it started up, and the neglect of that duty, leaving the plaintiff exposed to the premature starting of the car through the act of an intermeddler, was the negligence of one of the company's employés.

If, on the other hand, the custom among the company's conductors to lend one another assistance in such cases, as testified to by Conductor Flora, was unknown to the company and therefore unauthorized by it, or if no such custom existed, Conductor Flora was himself guilty of negligence in abandoning the duty of his position, or in deputing its performance to another, and for such abandonment of duty by him the company is as much responsible as for the abandonment of the same duty by the man Buckley. There is no escape from these conclusions. They are irrefutable. If Flora rightly deputed the performance of his duties to Buckley—that is rightly as to the company—and Buckley negligently omitted to perform them, the company is liable. If Flora had no right to turn the performance of his duties over to Buckley, but nevertheless did so, he must be held to have negligently abandoned them, in which event the company is equally liable. If the authority of adjudged cases be necessary to enforce these manifestly sound propositions, it can be found in *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, and *Booth v. Mister*, 7 Car. & P. 66.

Some of the plaintiff's testimony was in proof of an injury and resulting damages which had not been alleged ⁵⁰⁸ in the petition, and it is sought to apply thereto the rule declared in *Atchison etc. R. R. Co. v. Willey*, 57 Kan. 764. However, an examination of the record of the introduction of this testimony shows that plaintiff in error made no objection to its reception. It was allowed to go to the jury as offered, and upon it the plaintiff in error availed itself of the privilege of cross-examination. No objection was made to it, except by way of request for an instruction to the jury forbidding them to allow damages for the injuries proved but not pleaded. This was too late: *Johnson v. Mathews*, 5 Kan. 118.

Some minor claims of error raising questions of variance between the pleadings and proof are made. They are, however, quite technical and unsubstantial and lacking in merit.

The judgment of the court below is affirmed.

RAILROADS—STREET RAILWAYS—DUTY TO PASSENGERS. Street railway companies are common carriers of passengers, and as such are bound to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence: *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, and note.

RAILROADS—NEGLIGENCE OF STREET RAILWAY IN STARTING CAR.—The driver of a horse-car, when signaled to stop, must ascertain who and how many of his passengers intend to alight

at that place, and must wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and must, in any event, see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts it in motion. If he fails in any of these respects, and injury results therefrom, his employer is liable: *Birmingham etc. Ry. Co. v. Smith*, 90 Ala. 60, 24 Am. St. Rep. 761. See *Olfermann v. Union Depot R. R. Co.*, 125 Mo. 408, 46 Am. St. Rep. 483:

MASTER AND SERVANT—LIABILITY OF MASTER WHERE THIRD PERSON HELPS SERVANT.—One whose servants, by his direction, pile lumber, part of it without assistance, and the remainder of it with the voluntary and gratuitous aid of a third party, in so unskilled and unsafe a manner that it falls upon and kills a person, without any negligence or want of care on the part of the latter, is liable for the injury, whether the party who assisted in piling a portion of the lumber was or was not his servant: *Andrews v. Boedecker*, 126 Ill. 605, 9 Am. St. Rep. 649.

HART v. MODERN WOODMEN OF AMERICA.

[60 KANSAS, 679.]

INSURANCE, LIFE—PROVISION AS TO SUICIDE.—A provision in a life insurance policy that suicide by the insured, whether sane or insane, shall avoid it, is valid, and covers the case of one who intentionally commits self-destruction, understanding the physical nature and consequences of the act, although not conscious of its moral quality or consequences.

Amidon & Conley, for the plaintiffs in error.

Bentley & Hatfield, for the defendants in error.

⁶⁷⁸ JOHNSTON, J. On June 1, 1896, Ozro E. Hart applied for membership and insurance in the Modern Woodmen of America, and on June 5, 1896, a beneficiary certificate was issued to him, providing that ⁶⁷⁹ while in good standing he was entitled to participate in the benefit fund in the amount not to exceed three thousand dollars, which was to be paid at his death to his mother, Ruth America Hart. On June 13, 1896, Ozro E. Hart also obtained a beneficiary certificate in the order of the Knights of the Maccabees in the sum of three thousand dollars, payable at his death to Everett L. Hart, his son. In the case of the Modern Woodmen of America, it was expressly provided that the certificate should be void and all benefits which might have accrued absolutely forfeited if the insured should die "by his own hands, whether sane or insane." In the application Hart was asked if he understood that the order did not indemnify against death by suicide, to which he made an affirmative answer, and it was provided that the statement should constitute a part of the insurance contract.

In the case of the Knights of the Maccabees, the certificate provides that when the applicant becomes a member of the order he is entitled to the rights and benefits of the same, subject to the provisions of the laws of the order. The laws of the order expressly provide that no benefits shall be paid on account of the death of a member when death is "the result of suicide within one year after admission, whether the member so taking his own life was sane or insane at the time." On the certificate itself is printed this provision of the law, exempting the order from liability if the member commit suicide within one year after admission to the order, whether sane or insane. The application of Hart also contains this declaration: "I also agree that should I commit suicide within one year from the date of my admission into the order, whether sane or insane at the time, this contract shall be null and void." And he further stipulated that ^{also} the application and laws of the order should constitute a part of the certificate.

Within a few days after his admission into the orders and the taking out of the beneficiary certificates, Ozro E. Hart committed suicide, and the facts with reference to the suicide were agreed on between the parties and are as follows: "The said Ozro E. Hart was married on the fourth day of July, 1889, and lived and cohabited with his wife until the time of his death, and that his wife was the mother of said Everett L. Hart and he the father of said child; that on the night of the nineteenth or twentieth day of June, 1896, the said Ozro E. Hart first learned and discovered that his wife and one Pitt were occupying the same bed and illicitly cohabiting together, and that his said wife was guilty of adultery with the said Pitt, and that the said knowledge and information of the infidelity of his wife affected the mind of said Hart to such an extent and in such a manner that his reasoning faculties became so impaired that he, the said Ozro E. Hart, became unable to understand the moral character of his acts and became insane, and while in such condition of mind, and while being so insane, he shot and killed his said wife, then turned the pistol on himself, and shot and killed himself, in the city of Wichita, Sedgwick county, Kansas, on June 21, 1896."

In the trial the principal controversy was whether the self-destruction of Hart exempted the orders from liability, and the decision in each case was in favor of the defendant. While there is some contention to the contrary, it is clear that an

exception as to nonliability because of death by suicide, whether sane or insane, is a part of each of the insurance contracts under consideration. In one case it is plainly written on the face of the certificate, and in the other it is clearly provided for in the application and by-laws, which are referred to and made a part of the certificate, ⁶⁸¹ which together show the contract of the parties and that the exception is included.

Much diversity of judicial opinion has arisen as to the effect of the suicide of the insured. The supreme court of the United States has distinctly held that intentional self-destruction by the insured while sane is not a risk covered by a life insurance policy, even when the policy contains no exception as to such a death, and it was there said that such a risk could not be legally covered by an insurance contract, as it would be against public policy to make such a contract: *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139; *Supreme Commandery etc. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466. Other authorities hold that, where life insurance is effected for the benefit of wife or children, the suicide of the insured while sane is not a defense, in the absence of a condition or exception to that effect in the policy: *Fitch v. American etc. Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 15 Am. St. Rep. 430; *Mills v. Rebstock*, 29 Minn. 380. The supreme court of Wisconsin has held that intentional suicide while sane does not avoid a life insurance policy in the absence of any provision therein to that effect, if third persons are beneficiaries: *Patterson v. Natural Premium etc. Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899. There is much conflict in the authorities where the insurance contract merely excepts death by suicide or self-inflicted injuries—the result of varying standards in measuring the mental capacity and responsibility of the insured. With respect to this provision, Justice Gray of the supreme court of the United States, remarked: “The decisions upon the effect of a policy of life ⁶⁸² insurance which provides that it shall be void if the assured ‘shall die by suicide’ or ‘shall die by his own hand’ go far toward determining this question. This court, upon full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words ‘sane or insane,’ does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the

physical nature and consequences of his act, or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect": *Accident Ins. Co. v. Crandal*, 120 U. S. 527.

To avoid disputes as to the meaning of "suicide" and definitely to fix the extent of the risk, it is not uncommon to incorporate a condition in an insurance contract that it shall be void if the insured die by suicide, sane or insane. No reason is seen why a stipulation exempting the insurer from liability for acts of the insured committed while insane should not be enforced. It does not contravene sound morals or public policy, and courts must enforce the intention of the parties as expressed by it. As to the right of insurance companies to include such an exemption in the policy, it has been said that if "they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not."

As to the effect of the words "sane or insane," added to the condition, the same authority said: "Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended ^{ess} self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one can be misled by them, nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, 'suicide' means, as we have seen, the death of a party by his own voluntary act; and this condition, based as it is on the construction of this language, informed the holder of the policy that if he purposely destroyed his own life the company would be relieved from liability": *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284.

Such a condition does not admit of an interpretation to include death by accident or by mistake, although it may have resulted from the immediate act of the assured, but under an exception such as we are considering, if the insured purposely takes his own life the insurer goes free: *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 241; *Scarth v. Security etc. Soc.*, 75 Iowa, 346; *Billings v. Accidental Ins. Co.*, 64 Vt. 78, 33 Am. St. Rep.

913; *Streeter v. Insurance Soc.*, 65 Mich. 199, 8 Am. St. Rep. 882; *Salentine v. Mutual Ben. Life Ins. Co.*, 24 Fed. Rep. 161; *Union etc. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611; *Riley v. Hartford Life etc. Co.*, 25 Fed. Rep. 316; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Sabin v. National Union*, 90 Mich. 177.

In interpreting such an exception, a distinction has been made by some of the authorities between cases of insanity where the suicide was conscious of the physical nature and result of the act which causes his death, and cases where he did not appreciate the physical consequences of such act. If there be ground for such a distinction, there is no room for it in the cases under consideration. The agreed facts show a ⁶⁸⁴ case of intentional self-destruction, and that, while he did not understand the moral character of his acts, he had sufficient intelligence as to what the physical end and consequences of the same would be. We are not required to determine the effect of such an exception where the insured was so wholly bereft of reason that he did not understand the natural result of his acts, nor what would be the effect if, in addition to this exception, the contract contained a clause making it incontestable after a stated time and the death had occurred after that time. From the language of the contracts and the agreed facts as to the manner of Hart's death, it is clear that the risk was not within the contemplation of the contracting parties. The judgments of the district court will therefore be affirmed.

Doster, C. J., concurring.

Smith, J., not sitting.

LIFE INSURANCE—SUICIDE.—A life insurance policy declaring that if the insured shall die by his own hand, sane or insane, it shall become null and void, is avoided if he commits suicide while insane, unless his insanity was such that he did not know that his act was done for the purpose of self-destruction. It matters not that he had no conception of the wrong involved in its commission: *Streeter v. Western Ins. Co.*, 65 Mich. 199, 8 Am. St. Rep. 882. But in *Billings v. Accident Ins. Co.*, 64 Vt. 78, 33 Am. St. Rep. 913, it was held that it was immaterial whether or not the insured was in such an insane condition that he was incapable of understanding the physical nature and consequences of his act and did not know that by it he would take his own life.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY v. POTTER.

[60 KANSAS, 808.]

EVIDENCE—DECLARATIONS OF INFANT.—If an infant becomes a party to a suit, the same species of evidence is received against him as though he were an adult, and the mere fact that he does not understand the nature of an oath does not authorize the rejection of declarations made by him against his interest, but they should be cautiously received and their effect left to the jury to determine.

NEGLECTENCE—EVIDENCE—MENTAL CAPACITY OF INFANT.—If, in an action by an infant to recover for personal injury caused by negligence, his contributory negligence is made an issue, his brightness and intelligence are important considerations, and proof of them previously received on cross-examination without objection should not be stricken out. To thus strike out such proof is error.

A. A. Hurd, W. Osmond, O. J. Wood, and W. Littlefield, for the plaintiff in error.

N. Adams, G. P. Cline, and F. S. Haun, for the defendant in error.

808 JOHNSTON, J. This was an action brought against the Atchison, Topeka & Santa Fe Railway Company in behalf of George Potter, who was injured by a moving train in the yards of the company at Larned. It was alleged that, while attempting to pass around one train, another was negligently backed against him without signal, warning, or any precaution for his safety, crushing his foot so that amputation became necessary. The trial resulted in a verdict and judgment against the company for five thousand five hundred dollars.

Complaint is made of several rulings of the trial court on the pleadings, testimony, and instructions. The company asked the court to compel the plaintiff below to make his petition more definite and certain by setting forth the purpose of George Potter in crossing the yards where he did, and whether the accident occurred on a street or on the private grounds of the company, but the motion was refused. In this respect the petition was defective. It was important for the company to know whether the plaintiff below claimed the injury was inflicted at a public crossing or on its private grounds, and, if on its private grounds, whether he was there by invitation of the company or as a trespasser, or whether he went there to board a train as a passenger, or was merely playing in the yards and

was hurt while attempting to catch on a passing train. The duties of the respective parties on a street differ materially from those required of ^{§10} them on the private grounds of the company, and acts which will constitute negligence in one place could not be regarded as negligence or grounds of liability in the other. In order to prepare for trial and make its defense the company was, therefore, entitled to know what claim in this respect the plaintiff below made.

Mrs. Penrose was called as a witness and stated that she had talked with George Potter just a short time after he was injured, and heard him tell how the accident occurred, but the court would not permit the statement to be given. The company then offered to prove by her that in the conversation she then had he said that he was hurt while attempting to climb or hold upon a passing train. The evidence was excluded by the court on the ground that George Potter was incapable of understanding the nature of an oath, and that the court had previously refused to receive his evidence for the same reason. In this there was error. There is probably no more important kind of testimony than the declarations of suitors made against their own interests, and the admissibility of such testimony does not depend upon whether the person making such declarations recognizes or understands the nature of an oath. Infants who have not a due sense of the obligation of an oath may be excluded by the court, but when an infant becomes a party to a suit, or is liable, the same species of evidence is received against him as though he were an adult. His declarations are to be cautiously received on account of his age, but the value and force of the same are necessarily left for the determination of the jury: *Mather v. Clark*, 2 Aik. 209; *Tyler on Infancy*, 187. In this case the infant was less than seven years of age, but it would seem from the answers given by him on ^{§11} the inquiry as to his competency that his testimony should have been received. That was a question for the trial court, and it has a large discretion in the determination of the same. The test in such a case is not alone whether the infant is able to narrate facts correctly, but it is whether he comprehends the binding effect of an oath. As declarations against interest are not made under oath, that test is not applicable, and where, as in this case, the infant appears to be able to relate facts, his declarations should be received, leaving the jury to judge as to the value of the evidence from the age and intelligence of the

infant and the conditions under which the declarations were made.

The general rule requiring all evidence to be given under the sanction of an oath which operates to exclude some infants and other persons from testifying is not a bar to the admission of the competent declarations of such persons when related by competent witnesses. Under the common law, as well as in some of the states, atheists and persons without religious belief are deemed insensible to the obligations of an oath and incompetent as witnesses, but declarations made by them against their own interests would not, for that reason, be rejected in a litigation in which they were interested. Nor should declarations of a like kind made by an infant be rejected merely because the court concludes that he does not understand or appreciate the nature of an oath. The vital importance of the evidence excluded can easily be understood when it is known that there were but two witnesses who saw the accident, one of whom testified that he was run down by the train, while the other testified that he was hanging on the steps of a car. The declarations of the boy made immediately after ^{s12} the occurrence might have had great weight with the jury in settling the disputed question, and might have proved a controlling element in the case.

John Potter, who was a witness in behalf of his son,, testified on direct examination as to the age of the boy, and upon cross-examination testified that he was a bright boy. This testimony was received without objection, but afterward the court, on motion of the plaintiff below, struck it out. As an issue of contributory negligence was raised, the brightness or intelligence of the boy was an important consideration. This was recognized by the court in charging the jury, when an instruction was given that they might take into consideration the age and intelligence of George Potter in determining whether he was guilty of contributory negligence. Then, again, the jury were instructed that, in fixing the amount of damages, if plaintiff was entitled to recover, they might take into consideration the boy's age and intelligence; and a special interrogatory was submitted to the jury as to whether he had sufficient intelligence to know the danger of getting in front of a moving train. For the determination of these questions the testimony stricken out was material and important. It is suggested that it was not proper cross-examination, but no objec-

tion was made to it on that ground when it was introduced, and, on the whole, we think it was admissible.

For the errors mentioned the judgment will be reversed and the cause remanded for a new trial.

EVIDENCE.—AN INFANT'S CONFESSIONS AND ADMIS-
SIONS are evidence against him: *McCoon v. Smith*, 3 HILL, 147, 88
Am. Dec. 623, and note thereto.

NEGLIGENCE IN DEALING WITH CHILDREN: See the mono-
graphic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep.
406.

CASES
IN THE
SUPREME COURT
OF
KENTUCKY.

STANBERRY v. MALLORY.

[101 KENTUCKY, 49.]

WATERS AND WATERCOURSES—TITLE OF RIPARIAN OWNER.—Under a grant of land from the state on the shore of a navigable stream, the grantee owns to the thread of the stream, if not precluded by the terms of the grant.

WATERS AND WATERCOURSES—POSSESSORY TITLE OF SHORE.—If the owner of the shore of a navigable stream acquires title only by adverse holding, he is confined to his actual occupancy on the shore, unless, by notorious acts of ownership, he furnishes evidence of his intention to claim and hold to the middle of the stream.

Yeaman & Lockett, for the appellant.

R. H. Cunningham and S. B. & R. D. Vance, for the appellees.

“ **HAZELRIGG, J.** As early as 1796, as appears from a map made by the French General Collot, Towhead island in the Ohio river was a separate and distinct island, situated below the mouth of Green river, and lying to the south of and between Green river island and the Kentucky shore.

The first information the record before us furnishes as to its acreage is to be gathered from the patent granted by the state of Kentucky to Captain Terry in 1826 for twenty-two and one-half acres, and this only showing that it was at least that large in area. It is inferable that it was not much larger at that time. It increased rapidly, however, by accretion at its head, and in 1842 another patent, embracing land on this island, issued to Matthew McClain, for fifty-seven acres, and still an-

other for thirty acres, denominated accretion to the head of the island, issued to Mallory and Jackson McClain in 1878. Mallory's wife was the devisee of Terry, and Jackson McClain was the grantee of Matthew McClain, so that the whole of the island became the property of Mallory and McClain. By mutual deeds of 1879 they became the joint owners thereof, each of an undivided one-half. They were in the actual possession of the land, some of it being under cultivation, and had been in such possession for several years before their joint deeds in 1879, using the lands as their own and working the gravel bar lying immediately up stream from the island and forming a part of the growth or accretion to the island, and which was included in the patent of 1878.

In 1888 they sued the Nugents for a balance due for gravel dug by them under a contract, and were met by an answer to the effect that the Stanberrys, who were the owners of the lands on the Green river island opposite the Towhead, were in fact the owners of the gravel bar, and were entitled to and were claiming the proceeds sued for.

The Stanberrys appeared, and their petition, so averring, was filed and taken as their answer. The Nugents paid the sum due from them into court, and the issues as to the ownership ⁶¹ of the bar were completed and tried out between Mallory and McClain and the Stanberrys, the former winning.

It is fairly shown by the proof that the gravel bar is a growth or accretion to the Towhead and not to the Green river island, and that the patentees and their privies held the actual adverse and uninterrupted possession of the main island for many years before the institution of this action, and, moreover, had like possession of the sand bar, so far as its nature would permit of actual occupancy, for a number of years before 1878, when they obtained their patent.

This use and occupancy consisted in controlling and letting the bed out for the obtention of gravel therefrom, which was done under the eye of the Stanberrys, who lived near by and in sight of the work, and who at no time set up any claim thereto. Moreover, it is shown that the elder Stanberry, under whom appellants claim, distinctly disclaimed any interest in or ownership of this bed, and so testified in a suit involving its title in about the year 1880.

It is insisted for the appellants, however, under the rule settled in this state, in the case of *Berry v. Snyder*, 3 Bush, 266, 96 Am. Dec. 219, that under a grant of land from the com-

monwealth on the shore of the Ohio river the grantee owns to the thread of the stream, if not precluded by the terms of the grant, and that they are, therefore, the owners to the thread of the Ohio, which admittedly lies south of both the Towhead and Green river islands.

A complete answer to this contention is that the Stanberrys are the owners of the shore only by adverse holding. And it seems to be well settled that one who so holds is confined to his actual occupancy on the shore unless by notorious ⁵² acts of ownership, in so far as he may be able to exercise them, he furnishes evidence of his intention to claim and hold to the middle of the stream. This case affords an illustration of the wisdom of this limitation on the general rule. If the owners of Towhead island and its accretion opposite the land of appellants had sued the shore owners in ejectment, the answer may well have been, "We have not encroached on you—we are in the occupancy of the shore and have a right to be"—and yet, if the patentees did not sue, it is contended the adverse holding of the shore ripened into a perfect title to the thread of the stream. If, however, the shore owner has a grant from the sovereign, and under this well-known rule is thereby entitled to claim to the thread of the stream, his opposing claimant has notice, and may contest his right: *Corning v. Troy Iron etc. Factory*, 34 Barb. 582, and cases cited.

The judgment dismissing the claim of the Stanberrys is affirmed.

WATERS AND WATERCOURSES—TITLE OF RIPARIAN OWNER ON NAVIGABLE STREAM.—A grant by the state to a riparian proprietor, running with a navigable stream, extends only to low-water mark: Note to *Cox v. Arnold*, 50 Am. St. Rep. 453. A riparian owner on a navigable stream who derives his title from the government of the United States takes to high-water mark only, and not to the middle of the stream: *St. Louis etc. Ry. Co. v. Ramsey*, 58 Ark. 214, 22 Am. St. Rep. 195. In a few of the states, the title of persons owning lands bordering upon navigable rivers extends to the thread of the stream, while the general rule is, with respect to navigable streams and to tide waters generally, that the line of private ownership extends only to ordinary high-water mark: Extended note to *People v. Kirk*, 53 Am. St. Rep. 289; see the extended note to *Allen v. Weber*, 27 Am. St. Rep. 56. In *Bellefontaine C. Co. v. Niedringhaus*, 181 Ill. 426, ante, p. 269, a question somewhat analogous to that involved in the principal case was presented to the court, and resulted in a decision which we are inclined to view as inconsistent with that reached by the court of appeals of Kentucky. In the Illinois case, the question was, whether a person acquiring title by prescription to lands adjoining a navigable stream also acquired, by like means, prescriptive title to the accretions formed thereon, irrespective of the date of their formation, and it was held

that such accretions inevitably followed the title to the land to which they became attached, and it was of no consequence that the date of such attachment was so recent that no statute of limitations could have operated if founded alone upon the actual adverse possession of the accretion from the time of its formation to the commencement of the action.

PUGH v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

[101 KENTUCKY, 77.]

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—For an injury inflicted, producing damage, by two or more wrongdoers, an action may be maintained by the injured person either against any one or all of them, as the liability is joint and several.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—While several may be guilty of several and distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor, and the action is not to recover for the negligent act or acts, but for the injury which they produce.

NEGLIGENCE—WHEN NOT ACTIONABLE.—A party may be guilty of negligence, and, if no injury results therefrom, no action can be maintained therefor.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—If an injury is produced, not by design, but by the concurrent acts of negligence of two or more persons, although their acts are distinct and separate, yet they incur a joint and several liability for the injury which they produce. If the injured person should sue one of the tort feasons, and receive satisfaction from him, he cannot recover from the other wrongdoers. He is entitled to be compensated but once for the injury.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—If a person suffers injury from the joint negligence of two parties, and both are negligent in a manner contributing to the injury, both are liable jointly and severally, although one of them is a common carrier.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—One person is not liable for the effect of the negligent acts of another unless he is guilty of negligence which, together with the negligence of such other, produces an injury, and then he is jointly and severally liable for the injury produced.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—If an employer, though a common carrier, has been guilty of negligence in failing to discharge some duty imposed on it, and its agent or employé has been guilty of separate acts of negligence, all concurring in producing an injury, both the carrier and its agent or employé are jointly and severally liable therefor.

W. Goebel and W. H. Holt, for the appellant.

Wadsworth & Cochran, for the appellees.

⁸⁰ **PAYNTER, J.** While Pugh was the servant of the defendant company he lost a leg by a car passing over it, which resulted in the necessary amputation of it.

The action is against the railway company and Brown, Conway, and Thornton, respectively conductor, engineer, and fire-

man of the train, a car in which inflicted the injury. It is charged that the injury was inflicted by "the wanton and gross negligence of all defendants in operating said locomotive engine and cars, and in leaving the locomotive engine ⁸¹ of said train in charge and control of the fireman of said crew, and permitting said locomotive engine to be operated by said fireman, and in not having the cars of said train supplied with any apparatus or means to enable plaintiff to get on said cars, and in having the cars of said train unsafely, insecurely, and defectively equipped, plaintiff was thrown under the cars of said train and run over, and thereby one of his legs was so injured that the same was soon thereafter necessarily amputated, and he was otherwise severely and permanently injured in his person."

It is further charged that the defendants knew that the cars were not supplied with any apparatus or means to enable plaintiff to get on the cars; that the plaintiff had no knowledge thereof until after he was injured, and could not have had such knowledge by the use of ordinary care.

The court sustained a motion to strike out all that part of the petition wherein it is stated that the cars were not supplied with necessary apparatus, et cetera, and that the defendants knew of the absence thereof from the cars, and the plaintiff did not know thereof until after he was injured, nor could have known it by the use of ordinary care.

The court sustained the motion upon the ground that there were two causes of action stated—one against the corporate defendant and its employes for the negligence in operating the train; the other against the corporate defendant for not properly equipping the cars—and for the latter the employes were not liable, hence these causes of action were improperly joined.

Without stopping to inquire whether a motion to strike was the proper proceeding to correct the error, if one existed, ⁸² we will consider the real question involved. For an injury inflicted, producing a damage, by two or more wrongdoers, an action may be maintained by the one so injured, either against one of them or against all of them. The liability of the wrongdoer is joint and several. The injured party can elect whether he will proceed against one of them or all of them. While several may be guilty of several and distinct negligent acts, yet if their concurrent effect is to produce an actionable injury, they are all liable therefor. The action, properly speaking, is not to recover for the negligent act or acts, but it is to recover

damages for the injury which they produced. A party may have been guilty of negligence, but, if no injury resulted from it, no action could be maintained therefor.

Parties may form a conspiracy to injure one. Each of the conspirators may be guilty of distinct acts, all of which concur in producing the injury. An action may be maintained against all of them to recover the damages resulting to the injured party. So if an injury is produced, not by design, but by the concurrent acts of negligence of two or more persons, although their acts were distinct and separate, still they incur a joint and separate liability for the injury which they produced. If the injured party should sue one of the tort feasers and receive satisfaction from such one, he could not recover from the other wrongdoers, as he would not be entitled to be compensated but once for the injury.

In *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727, where several different creditors, acting separately, without concert, and without knowledge that they were employing a common agent, wrongfully caused their debtor to be arrested on their several ⁸³ writs by the same officer, who served the writs simultaneously, and by virtue thereof committed the debtor to jail, where he was confined upon all of them at the same time, they were held to be joint trespassers.

The court said, in *Cuddy v. Horn*, 46 Mich. 603, 41 Am. Rep. 178: "An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally."

The court held in *Colgrove v. New York etc. R. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418, a passenger injured by a collision resulting from the concurrent negligence of two railroad corporations may maintain an action against both.

In *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628, the court adjudged that the comparative degrees in the culpability of the two will not affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly and severally.

In *Flaherty v. Minneapolis etc. Ry. Co.*, 39 Minn. 328, 12 Am. St. Rep. 654, it was held that the injury having been caused directly by the concurrent wrongful acts or omissions of both defendants, all tending directly to produce the one resulting event, the action against them jointly was maintainable, although there was no concert of action or common purpose between them.

In *Bunting v. Hogsett*, 139 Pa. St. 376, 23 Am. St. Rep. 192, the court recognized the general rule to be that, if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they both are liable jointly and severally, and it would seem in principle to be a matter of no consequence that one of them is a common carrier. Neither the comparative degrees of care ⁸⁴ required nor the comparative degrees of culpability established can affect the liability of either.

In *Carterville v. Cook*, 129 Ill. 155, 16 Am. St. Rep. 248, the facts which the evidence tended to prove were these: A boy some fifteen years of age, while in the observance of ordinary care for his own safety, passing along a much used public sidewalk of the defendant, was, by reason of the inadvertent or negligent shoving by one boy of another boy against him, jostled or pushed from the sidewalk, at a point where it was elevated some six feet above the ground and was unprotected by railing or other guard, and thereby severely injured in one of his limbs. The court said: "It is not perceived how, upon principle, the intervention of the negligent act of a third person, over whom neither the plaintiff nor the defendant has any control, can be different in its effect or consequence in such case from the intervention therein of an accident having a like effect. The former, no more than the latter, breaks the causal connection of the negligence of the city or the village with the injury. The injured party can no more anticipate and guard against the one than the other, and the elements which constitute the negligence of the city or village must be precisely the same in each case; and we have accordingly held that, where a party is injured by the concurring negligence of two different parties, each and both are liable, and they may be sued jointly or separately."

The case of *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 702, is in accord with the cases cited, and the court said: "If the negligence of the company contributed to it, it must necessarily have been an immediate cause of the accident, ⁸⁵ and it is no defense that another was likewise guilty of wrong."

Brown v. Coxe, 75 Fed. Rep. 689, is a well-considered and instructive case. It is alleged in that case that the plaintiff, while employed on a steamboat, was injured by the falling of a coal bucket operated by *Coxe Brothers & Co.*, and that they were negligent in using defective machinery, and in operating it negligently, and that the plaintiff's employer, the steam-

boat owner, was negligent in not providing him a safe place to work and in not warning him of the danger. The court held that, as the alleged acts of negligence of Coxe Brothers & Co., and the steamboat owner, though distinct in themselves, concurred in producing the injury, their liability was joint as well as several.

In Bishop on Noncontract Law, section 518, it is stated that "the rule of law is that a person contributing to a tort, whether his fellow contributors are men, natural, or other forces or things, is responsible for the whole, the same as though he had done all without help."

Wharton's Law of Negligence, section 395, says: "The comparative degrees in the culpability of the two will not affect the liability of either. If both were negligent in a manner contributing to the result, they are liable, jointly or severally."

While the alleged negligence of the corporate defendant in failing to supply the cars with necessary apparatus for the use of its servants employed in and about its business of operating the cars may have continued for days or weeks before the accident, still it existed at the moment of the accident,⁸⁶ and concurred with the alleged negligence of its codefendants in producing the injury.

It is freely admitted that one person is not liable for the effect of the negligent acts of another person (except in cases of agency, et cetera), but when he is guilty of negligent acts which, together with the negligent acts of another, produce an injury, then he becomes jointly and severally liable for an injury produced. Hence, in a case when passengers are injured by a collision of trains of different companies, when the negligence of both co-operate to cause it, both are jointly and severally liable.

We can perceive no reason why an employer, who has been guilty of negligence in failing to discharge some duty imposed on him, and its agent has been guilty of a separate act of negligence, and both of these negligent acts concur in producing an injury, why both are not liable jointly and severally. Each must be regarded as having been the immediate cause of the accident which produced the injury. But one cause of action is stated in the petition.

Of course, an employer or an agent cannot be held liable for an injury to which he did not contribute by his own negligence.

We are of the opinion that the facts appearing in the bill

of exceptions entitled the plaintiff to have his case submitted to a jury. As there is to be another trial, we forbear to comment upon the evidence.

The court can, by proper instructions, submit the questions of law that may arise from the evidence as to the respective liabilities of the several defendants.

The court erred in sustaining the motion to strike out the ⁸⁷ parts of the petition in question and in giving the peremptory instruction to the jury to find for defendants.

The judgment is reversed, with directions that further proceedings conform to this opinion.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—When one has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are jointly and severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff has his election to sue all jointly, or he may bring his separate action against each or any of them: *Note to Burk v. Howley*, 57 Am. St. Rep. 615. When an injury occurs through the concurrent negligence of two persons, and would not have happened in the absence of either, the negligence of both is the proximate cause of the accident, and both are answerable: *City etc. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262. Both are answerable for the resulting injury, and the negligence of one is no excuse for the negligence of the other: *Gulf etc. Ry. Co. v. McWhirter*, 77 Tex. 356, 19 Am. St. Rep. 755. If a judgment against one wrongdoer is satisfied, such satisfaction operates to release any other person who is jointly answerable for the negligence: *Extended note to Carterville v. Cook*, 16 Am. St. Rep. 254.

NEGLIGENCE—JOINT AND SEVERAL LIABILITY—CARRIERS.—When a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, both tortfeasors are liable jointly and severally to him in damages: *Bunting v. Hogsett*, 139 Pa. St. 363, 23 Am. St. Rep. 192.

BAUMEISTER v. MARKHAM.

[101 KENTUCKY, 123.]

TRIAL—PRACTICE—RIGHT TO CONTINUANCE.—A dismissal of the action by the plaintiff as to one of several joint defendants does not entitle the others to a postponement of the trial or to a continuance of the case.

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE ALONE—DESERTION OF HUSBAND.—Under a statute authorizing a wife to sue in her own name for injury to her person or character if her husband refuses to join with her, his desertion for several years, his failure to support her, and his marriage to another woman, are tantamount to a refusal to join in any action brought by her.

JUDGMENTS OBTAINED UNDER ASSUMED NAME—VALIDITY.—If the identical person who receives an injury sues to recover therefor in an assumed name, a judgment in her favor is

not invalid for the reason that she sues under a name adopted by her for the theatrical stage, and by which she is generally known.

TRIAL—INSTRUCTIONS—PEREMPTORY.—To authorize the giving of peremptory instructions to the jury to find for defendant, it must appear that, admitting all of the testimony to be true, and every inference fairly deducible therefrom, and considering all of the undenied allegations of the petition, the plaintiff has failed to support his claim.

NEGLIGENCE—CONTRACTORS AND SUBCONTRACTORS—JOINT LIABILITY.—If joint supervision and co-operation of the principal contractor of a building on a highway and of his subcontractor of a portion of it becomes necessary and is exercised, a joint obligation to the public exists, and joint liability is fixed for personal injury to a stranger, resulting from an act done or duty omitted in a negligent manner by the subcontractor during the prosecution of the business.

NEGLIGENCE—CONTRACTORS—CARE REQUIRED OF. Contractors who are constructing buildings and making excavations along the streets of a city are required to exercise such degree of care as is reasonably proportionate to the danger of risk or probability of risk to others involved in each particular case that may arise out of the nature and character of the acts creating such risk or danger.

NEGLIGENCE—CONTRACTORS—EXPOSED EXCAVATION.—If a person exercising ordinary care is injured by falling into an exposed and unguarded excavation, made by a contractor while constructing a building, it is no defense to show that such excavation was covered and guarded five or six hours before the accident, there being no evidence as to how or by whom it was, in the meantime, exposed and unguarded.

NEGLIGENCE—CONTRACTORS—EXCAVATION—NUISANCE.—If contractors, while constructing a building, make an excavation which is unauthorized and dangerous, it becomes, *ipso facto*, a nuisance, and they are bound in any event to keep it clear from any danger to others.

NEGLIGENCE—SPECIAL DAMAGES—IMMORAL CONTRACT.—In an action to recover for personal injury caused by negligence, an instruction that plaintiff cannot recover special damages on account of a broken leg, if it is part of her business to go upon the theatrical stage and exhibit her legs in such manner as is indecent in fact and immoral in its tendencies, or on account of her loss of opportunity to earn money in such employment, is properly refused.

P. B. & W. W. Muir and I. T. Woodson, for the appellants.

O'Neal, Phelps & Prior, Humphrey & Davie, and A. Selligman, for the appellee.

¹²⁶ LEWIS, C. J. Pauline Markham brought this action against John Baumeister & Brother, J. J. Merriweather, and city of Louisville to recover for personal injury, consisting of a broken leg and bruises on other parts of her body, which resulted from a fall at night into a hole in the sidewalk of Seventh street.

The action when called for trial was, on motion of plaintiff, dismissed as to city of Louisville, and this is an appeal from a judgment against the remaining defendants for four thousand dollars in damages.

1. It is urged as ground for reversal that the lower court, disregarding section 363 of the Civil Code, overruled the motion for continuance made by the other defendants, now appellants, upon dismissal as to city of Louisville. That section does provide the plaintiff in an action ordinary, other than actions on contract, can demand a trial at any term as to part of the defendants only upon dismissing his action on the first day of such term as to the others. But we still think, as held in *Buckles v. Lambert*, 4 Met. (Ky.) 330, it was intended ¹²⁷ to apply merely in cases where some of the defendants have been summoned and others not summoned.

In our opinion the ruling in question was authorized by section 373, as follows: "Though several defendants are summoned, judgment may be rendered against any of them if the plaintiff would have been entitled to judgment against them in an action against them alone." For as under it judgment might have been rendered against any defendant to this action, all being summoned, dismissal as to city of Louisville plainly did not involve the right of the others to postponement of the trial.

2. Two days before that on which the action was set for trial Baumeister & Brother and Merriweather each tendered an amended answer, stating they had recently learned the person suing was a married woman, wife of Randolph Murray, and not named Pauline Markham; but their motion to file was overruled.

Unless the alleged facts are material, there was no need of filing the amended answer, about which the court then had discretion, nor error in denying the motion to file. Section 34, as amended in 1892, is as follows: "In actions between husband and wife, in actions concerning her separate property, and in actions concerning her general property, and in actions for the personal suffering of or injury to her person or character in which he refuses to unite, she may sue or be sued alone." So the only relevant inquiry touching capacity of appellee to sue alone in this action is whether her husband, if she has one, refused to unite. But that question was not raised in either amended answer, nor by motion for rule against her to show cause why the action should not be ¹²⁸ dismissed, which would

have been proper practice. And, even if it had been done, her right to sue alone would have been shown by the fact Murray, beside deserting her and marrying another woman, has for several years failed to support and protect her, which conduct should be treated as tantamount to his refusal to unite in any action she might bring.

Section 134 provides the court may, at any time, in furtherance of justice and on such terms as may be proper, cause or permit a pleading or proceeding to be amended by correcting a mistake in the name of a party, but appellee did not offer to amend her petition in that respect, nor did appellants move the lower court to require it done. The question then arises whether a judgment may be affected by being rendered in the assumed instead of real name of a plaintiff.

It is a rule of practice recognized by this court that if the defendant to an action, though sued in the wrong name, was in proper person before the court and litigated with the plaintiff about the subject of controversy, a judgment against him on the merits of the case is as valid and effectual as if he had disclosed, and the action had been rendered in, his true name.

There is no reason why the same rule may not as well apply to the case of a plaintiff suing in an assumed name, if the defendant has not been thereby prejudiced. Therefore, if appellee be the identical person who received the injury complained of, as is so, the judgment in her favor should not be held invalid for the only reason she chose to sue in a name adopted for the stage, and by which she is generally known, for appellants have not been thereby misled, nor can she ¹²⁰ maintain another action for the same cause against them or either of them.

3. At the conclusion of evidence in chief on behalf of appellee, Merriweather asked for a peremptory instruction to the jury in his favor, which was refused. To authorize such instruction it should appear that, admitting the testimony to be true and every inference fairly deducible from it, the plaintiff still failed to support his claim: *Shay v. Richmond etc. Co.*, 1 Bush, 108. But that rule is qualified by another, that an allegation in the petition, admitted or not sufficiently denied in the answer, need not be proved.

The testimony in chief on behalf of appellee shows that she went to Louisville under a contract to perform as leading actress in a theater, arriving at Seventh street railroad depot on a Sunday about 11 P. M., thence, accompanied by others, she

proceeded along that street, which was a direct route to the boarding-house where she started to go; and, while walking on the sidewalk abreast with her companions and next to the row of houses between Main and Market streets, fell into the hole, and was injured as mentioned. The hole was a part of or an opening to the cellar of a brick house then being torn down, extended in, or, when properly covered, under the sidewalk about four feet, and was made by timber or brick falling or being thrown down upon and breaking the door shutter or boards used to cover it. But it was, at the time plaintiff received the injury, neither covered, fenced, or in any manner inclosed, and, though the night was a dark one, there was no light, by lamp, or otherwise, to enable persons passing along there to see or avoid falling into it.

The testimony introduced by appellee fully established the ¹³⁰ fact she was injured by negligence or wrongful act of others, without fault on her part. But she did not prove, though it was at a subsequent stage of the trial shown, that Merriweather or his servants actually caused the opening into which she fell. Nor do we think it was indispensable for her to do so in order to maintain the action against him, for, in her petition, she distinctly alleged, not only that he and Baumeister & Brother wrongfully caused the hole, which was large and dangerous, to be made, but, wrongfully and in disregard of their duty, permitted it to remain open, exposed, and unlighted. And, although it is not in his answer expressly admitted he caused it to be made, he does substantially confess it was his legal duty to keep it sufficiently covered, barricaded, and lighted at night to prevent persons of ordinary diligence falling into it; and pleads, in avoidance of liability for his alleged failure to perform that duty, that he did do so, and, if such was not the condition when appellee received the injury, it was because evil disposed persons had, without his knowledge or consent, removed the covering, barricades, and lights he had caused to be put there.

In our opinion, facts sufficient to constitute *prima facie* a cause of action against him were either proved by her or admitted in his answer; and, consequently, the peremptory instruction was properly refused.

4. It appears that Baumeister & Brother were the original contractors for the entire work of tearing down the old and constructing a new building at the place appellee was injured; but made a subcontract with Merriweather, the terms of which

are shown by a written proposition signed by him and accepted by them, in these words: "I propose to do ¹³¹ the following brick work, in addition to storehouse on the northwest corner of Seventh and Market for Samuel Brandeis' estate, in accordance with plans and specifications; take down all brick wall, clean the brick to be used again in the new building, and move away the rubbish; and will furnish all new brick and lay same to complete house, in accordance with plans and specifications, for the sum of eleven hundred and twenty-six dollars." And it is now argued for them that he, being an independent contractor, is singly, if at all, and they are not in any event, liable in this action.

The recognized general rule is that, in order to render one person answerable for another's neglect or wrongful act, there must exist between them the relation of master and servant, involving right of the former to control the conduct of and discharge from his service or employment the latter. And accordingly it was held in *Robinson v. Webb*, 11 Bush, 474, cited by counsel, "that when the relation of independent contractor exists as to the use of real property, and the party employed is skilled in performance of the duty he undertakes, and the thing directed to be done is not in itself a nuisance, or will not necessarily result in a nuisance, the injury resulting not from the fact the work is done, but from the negligent manner of doing it by the contractor or his servants, the owner cannot be made to respond in damages."

It seems to be also established that the question as to liability of the original contractor for negligence or wrongful act of an independent subcontractor should be determined by the same rule. So, if it be applied in this case without qualification or exception, Baumeister & Brother would probably be exempt from liability, for, as Merriweather had ¹³² the right to complete that portion of the work specified in the contract between them free of their control or power to discharge him, he was pro tanto an independent contractor. But it was held in the same case that the rule should be so qualified that when the act must necessarily result in a nuisance, unless it be prevented by proper precautionary measures, the owner is bound to the exercise of such measures. And in *Matheny v. Wolffs*, 2 Duvall, 137, is this language: "If the owner of real estate suffers a nuisance in or adjacent to his premises in prosecution of a business for his benefit, when he has the power to abate the nuisance, he is liable for an injury resulting there-

from to third persons." Of course, the same duty is put upon and same liability for nonperformance of it is incurred by the principal contractor in temporary possession of real property for erection of a building thereon, and during prosecution of the business by a subcontractor. Besides, although the owner or, as in this case, the original contractor is not generally answerable for negligence or wrongful act of an independent contractor or subcontractor, special circumstances may exist making him so: Thompson on Negligence, 912. And undoubtedly where joint supervision and co-operation of the principal contractor of a building on a highway and of his subcontractor of a portion of it becomes necessary and is exercised, a joint obligation to the public will exist, and joint liability be fixed for personal injury to a stranger, resulting from an act done or duty omitted by the latter during prosecution of the business.

We think such is this case. For, although the opening in the sidewalk may have been actually caused by Meriweather or his servants, and he was for that reason bound while doing ¹³³ his part of the work to use all necessary means to prevent injury thereby to others, still, as the remaining portion was under control, required presence of, and had necessarily to be done by Baumeister & Brother concurrently and conjointly with the brick work devolved upon him, they were not released from their primary duty to the public as principal contractors, but bound to see to it the business was so done as not to hurt other persons. The instruction asked specially in their behalf was, therefore properly refused.

Witnesses for appellant testify that at close of the day's labor on Saturday preceding the Sunday appellee fell into the hole or area in question it was covered with door shutters and inclosed by joist resting on upright barrels in which were put bricks, and fastened to and braced by other joists. But the evidence does not show by whose agency or why the condition was subsequently so changed that at 11 P. M. Sunday the hole was neither covered, barricaded, nor lighted.

Instructions given to the jury and refused as to duty and liability of appellants necessary to be considered are as follows:

1. The court instructs the jury that it was the legal duty of the defendants, John and Henry Baumeister, and J. F. Meriweather, at all times during and while they were constructing the improvements in question, to so guard or protect, or cover or fence around or otherwise secure and make safe the area or cellar opening on the sidewalk in front of the build-

ing they were repairing, as to make it safe for pedestrians passing along said sidewalk at night.

2. That in the performance of the duty defined in instruction No. 1, the defendants were required by law to exercise ¹³⁴ ordinary care—that is, that degree of care which persons of reasonable prudence are accustomed to exercise under the same or similar circumstances to prevent injury to others. That ordinary care as thus defined varies with the circumstances of particular cases, and is and must always be proportionate to the danger or risk of injury involved in the circumstances of the particular case so that what might be ordinary care under one set of circumstances, when little or no danger or risk is involved, might be negligence or want of ordinary care under other and different circumstances when the danger, risk, or probability of injury to others is great; in other words, the law requires that the care to be exercised shall always be reasonably proportionate to the danger of risk or probability of risk to others that may arise out of the nature and character of the act or acts creating such risk or danger.

3. That the duty defined in instruction No. 1, with the care defined in instruction No. 2, continued with the defendants at all times during and while the area or cellar opening remained on the sidewalk from the beginning to the completion of the work of the construction or improvement of said building.

4. If the jury believe from the evidence that the injuries complained of by the plaintiff were caused by failure on the part of defendants, or either of them, or their servants or employes, to perform the duties defined in instruction No. 1, with that degree of care defined in No. 2, then the law is for the plaintiff, and the jury should so find; unless the jury should also believe from the evidence that on occasion of the injuries or falling into the cellar the plaintiff failed to exercise ¹³⁵ such care for her own safety as an ordinarily prudent person would have exercised under the same or similar circumstances, and that but for such failure on her part the injury to her would not have been inflicted, in which event the law would be for the defendants, and the jury should so find.

Appellants asked for various instructions that were refused, the following being the only one necessary to consider: "If the jury believe from the evidence that the area into which plaintiff claims to have fallen was on Saturday about 6 o'clock P. M. so covered by defendants or their employes as to secure all persons passing on Seventh street from injury, and that said

area remained so covered and secure through Sunday until night set in, the law is for the defendants, even though they should believe that the said area was uncovered at or about 11 o'clock that night, and plaintiff fell into it and received the injury complained of, unless they should further believe from the evidence that defendants or some one of them knew that said area was uncovered."

Obviously, the primary purpose of a street is for travel and passage of the public. And, as said in Dillon on Municipal Corporations, section 1032, on authority of numerous cases cited, "no person, not even the adjoining owner, whether the fee of the street be in himself or in the public, has the right to do any act which renders the use of the street hazardous or less secure than it was left by the municipal authorities. Whoever does so, whether by excavation made in the sidewalk, or by opening or leaving open an areaway in the pavement, or in any other manner which makes use of the street unsafe or less secure, is guilty of a nuisance."

¹³⁶ But, of course, the right of the public to free and unobstructed use of a street must be subject to reasonable limitations and restrictions in the interest of commerce and improvement of adjacent lots, that incidentally involve excavations under sidewalks, deposit of building materials, and other obstructions. Though in language of the same author, section 930, "an excavation, even when licensed by municipal authority, must be made in such manner as shall not in any measure detract from safety of the streets for public travel, nor can a street be obstructed for any purpose in an unreasonable manner or for an unreasonable time."

But while there appears to be a general assent to correctness of that rule, there is some divergence of judicial views as to the degree of care required of an abutting owner in order to relieve himself of liability for injury resulting to another from obstructions put in a street for his own private purpose.

In the case of *Congreve v. Smith*, 18 N. Y. 79, the action was for personal injury resulting from the breaking of an unsuitable and unsafe flagstone forming part of the sidewalk, and falling of a small child into the area beneath. It was there held that a person who, without special authority, makes or continues a covered excavation in a street for a private purpose, is, in the absence of negligence of the party injured, responsible for all injuries resulting from the way being thereby rendered less safe, irrespective of any degree of care or skill of the

party who makes or continues the excavation. And in the case of *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495, for personal injury arising in the same manner and the same time, the court said: "The liability of the defendants does not depend upon their negligence, either in providing ¹³⁷ an unsuitable stone or in continuing the use of it after it had become unsuitable from any cause, but from the fact that the stone was unsafe at the time the injury occurred, and thereby occasioned the injury. When the stone became unsafe for any reason, the area was a public nuisance, in like manner as any injury or obstruction to the street would be, and the defendants who continued it were responsible for it to the public, and to individuals receiving special damage from it. They were bound, at their peril, to keep the area covered in such manner that it would be as safe as if the area had not been built. This measure of liability is essential to the public interests and the protection of the rights of individuals."

In the case of *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, cited by counsel, the action was against the owner of a lot adjacent to the street and a contractor of a building to be erected thereon for an injury resulting from falling into a hole opening into a cellar that was not sufficiently covered or guarded. But the main question was whether Clark, the owner, was liable at all, the contractor, Freeman, being at the time in possession and control of the premises. Though determination of that question involved inquiry whether the excavation in question, being made without special authority, was unlawful, the court conceding that if it had been ipso facto unlawful as an unnecessary encroachment on the street, Clark and Freeman would have been liable, if any liability existed, jointly as wrongdoers. And upon that subject the court said: "As the excavation was an act pertaining to the construction of a building on a lot fronting upon the street, if necessary and proper, it was not necessarily or intrinsically ¹³⁸ unlawful, and whether it became unlawful depended on whether it was extended to an unnecessary or unreasonable extent into the street; or whether it was made in an improper or dangerous manner; or whether, through negligence, it was left insufficiently guarded by a fence, or allowed to continue an unreasonable length of time, these being questions of fact to be determined by the jury."

In *Fisher v. Thirkill*, 21 Mich. 1, 4 Am. Rep. 422, also relied on by counsel for appellants, the question was whether

the owner of a building who had, without express municipal authority, made a scuttle or hole in the sidewalk, or his tenant was liable for injury to a traveler caused by its being out of repair, it appearing to have been safely constructed originally. And the court held such excavations, if properly made and guarded, to be lawful unless done in contravention of some law, and to draw after them no such consequence as that the party making them shall be responsible for all injuries resulting from the want of entire safety. But Dillon, in a note commenting on that case, said: "Since these excavations are made for the exclusive benefit of the owner of the building, the author sees nothing unreasonable in the doctrine that he is bound to see that they are kept in repair, and do not become nuisances by becoming dangerous."

The precise question now presented has not been directly decided by this court. But it seems to us not at all unjust or unfair to simply require of the owner of a lot, as condition of being permitted to obstruct a street for his private benefit and to the inconvenience or annoyance of the public, that he does not render it thereby less safe for travel. And, if he fails to comply with that condition, it should not make any difference ¹²⁰ whether the improvement be made by or without municipal authority, as in either case he would be derelict in a duty he owes to the public and liable for resulting injury to another. Nor need there result any hardship upon the owner, because, unless, as said in *Robinson v. Webb*, 11 Bush, 474, the thing directed to be done is in itself a nuisance, or will necessarily result in a nuisance, the contractor or tenant in possession may be generally made to respond in damages for an injury done in prosecution of an improvement, or by reason of failure to repair.

However, there is no necessity to apply a harsher rule in order to justify the instructions given in this case than that stated in *Nelson v. Godfrey*, 12 Ill. 22: "But while we infer a license thus to use part of a public street, it is on the condition that the person doing so shall use more than ordinary care and expedition in prosecution of the work. Neither the public nor other individuals derive any possible advantage from such a use of the sidewalk, but it is solely for the benefit of the person thus using it, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible."

Therefore, we do not think appellants can justly complain

of the legal proposition stated in one of the instructions, that the required care in such cases should be proportionate to the danger or risk of injury involved in the circumstances of the particular case. Nor did their legal duty require of them less than at least ordinary care during the entire time they were constructing the improvements, in guarding the dangerous hole they had made; such, as we interpret it, being the meaning of instruction No. 1.

¹⁴⁰ It thus follows that the instruction asked by appellants and refused does not describe the full measure of diligence and care required of them. And it seems to us it is not a sufficient answer for the wrong and injury done to appellee that the hole was covered and barricaded five or six hours before she was hurt, without any evidence whatever as to how or by whom it was in the meantime rendered exposed and unguarded. In fact, it is scarcely credible that disinterested persons were willing to take the risk of detection by the police or persons passing along the street and expend the labor and time required to effectually tear away and remove all the covering and fencing, if the hole was as securely covered and strongly barricaded, and so remained up to nightfall, as is assumed in that instruction to have been done. But whether it is so the jury were permitted and required by the instructions given to consider and determine.

However, the question of diligence does not really arise in this case, because making the opening in question was not an incident of or necessary to, but an act disconnected with, the improvement appellants had undertaken to construct, and, being both unauthorized and dangerous, was *ipso facto* a nuisance, and appellants, having unjustifiably and without excuse caused it, were bound at their peril to keep it secure and safe from danger to others.

We are not authorized to conclude amount of the verdict in this case was result of passion or prejudice of the jury, and so it is not province of this court to disturb it.

Judgment affirmed.

The court delivered the following response to the petitions for rehearing on the 18th of June, 1897:

¹⁴¹ We see nothing in the two able and earnest petitions for rehearing to convince us the ruling in the opinion delivered is incorrect, or that was not substantially presented for our consideration in the original briefs.

But we will now consider an alleged error omitted from that opinion, and again called to our attention in the petition of Merriweather—that is, refusal of the lower court to give the following instruction: “The court instructs the jury that if they believe from the evidence that a part of the business of the plaintiff was to go upon the stage and exhibit her legs in such a manner as is indecent in fact and immoral in its tendencies, then, in this event, the loss of opportunity to earn money in such employment can form no basis for recovering damages.”

The object of that instruction was to inhibit the jury giving damages by reason of loss of profits from a special contract made by appellant with the proprietor of a theater to perform as “a burlesque opera bouffe artist.”

It may be, as testified by appellant, such performance requires the artist to “show her limbs in silk stockings,” but, while it is tolerated by law and patronized openly and freely by the public, the court cannot arbitrarily outlaw those who earn a livelihood in that way.

The petitions are overruled.

TRIAL—CONTINUANCE.—The granting or refusing of motions to continue a case rests largely in the sound discretion of the court below, and its rulings in regard thereto will not be disturbed unless clearly erroneous: *Newell v. Leathers*, 50 La. Ann. 162, 69 Am. St. Rep. 395.

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE ALONE. A wife who is deserted by her husband, and who continues to live apart from him, and is dependent on herself for support, may sue and be sued as a feme sole: *Smith v. Silence*, 4 Iowa, 321, 66 Am. Dec. 137; *Phelps v. Walther*, 78 Mo. 320, 47 Am. Rep. 112.

NAMES—USE OF ASSUMED.—A person may contract under an assumed name: *Scanlan v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326. A conveyance under an assumed name is good as between the grantor and grantee: *Fallon v. Kehoe*, 33 Cal. 44, 99 Am. Dec. 347. Changing fictitious to real names in a judgment: See *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263.

TRIAL—INSTRUCTIONS DIRECTING VERDICT.—The court may properly instruct the jury to return a verdict for the defendant when the evidence, with all the inferences to be drawn therefrom, is so insufficient to support a verdict for the plaintiff that the court will be compelled to set it aside: *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202.

NEGLIGENCE—CONTRACTORS—JOINT LIABILITY.—One who superintends the construction of a building as agent of the contractor corporation, although he may be, in fact, an officer of the corporation, is jointly liable with the contractor, in an action on the case for an injury to a third person, resulting from culpable negligence in the construction of the walls of the building: *Mayer v. Thompson-Hutchison Building Co.*, 104 Ala. 611, 53 Am. St. Rep. 88. A contractor is not always jointly liable with the subcontractor: *Extended note to Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 201.

NEGLIGENCE—CONTRACTORS.—On the liability of independent contractors, see the extended notes to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 91; *Stone v. Chesire R. R. Corp.*, 51 Am. Dec. 201.

BELL v. KINNEER.

[101 KENTUCKY, 271.]

INSURANCE—BENEFICIARIES—DISTRIBUTION OF PROCEEDS.—Under a policy of life insurance taken by a wife upon her life, providing that the insurance money shall be payable to and for the sole and separate use of her husband and children, he and they do not take the insurance by inheritance, but, upon her death, the insurance money must be divided per capita between the husband and living children. The only effect of the death of one of such children before that of the insured is to reduce the number of parts into which the insurance fund is to be divided.

Sweeney, Ellis & Sweeney, for the appellant.

W. F. Hayes, for the appellees.

²⁷² **PAYNTER, J.** The Kentucky Grangers Mutual Benefit Society, on March 7, 1887, issued a policy of insurance on the life of Mary E. Kinneer. J. A. Kinneer was her husband; at the time the policy was issued they had five children. Before the mother's death one of the children, an infant, died. The mother died in 1890. J. A. Kinneer qualified as the guardian of the four remaining children, and received for himself and as guardian nine hundred and ninety dollars and fifty-six cents from the society which issued the policy. J. A. Kinneer died some three years after his wife. These consolidated actions were brought on the bonds which he executed as guardian, with J. M. Bell as security.

It is contended: 1. That J. A. Kinneer, as the husband of the insured, inherited the entire sum named in the policy; ²⁷³ 2. That in the event the courts hold the father, as guardian, was liable to his children, then he had paid his son A. W. Kinneer the full amount due him; 3. That he had expended for the support and education of J. C. Kinneer, Ora B. Kinneer, and Edna Kinneer the entire amount due them. Before entering into the consideration of the other questions, it may be added here that there is no proof to sustain the contention or claim that the father had paid A. W. Kinneer the amount due him.

The policy provides that the "said sum shall be payable to and for the sole and separate use and benefit of said Kinneer's husband and children." It was an express contract with the so-

ciety, in consideration of the premiums which the insured agreed to pay, the husband and children were to be paid, within a given time after her death, the sum named in the policy. The very terms of the policy preclude the idea that the husband and children were to receive the sum by inheritance. They had an insurable interest in the life of the wife and mother, and were made beneficiaries under the policy. The children were as much the object of her solicitude and care as was the husband. The policy was as much for their several benefits as it was for the benefit of the husband. The policy was issued and the insured died while the General Statutes were in force. Under the statute then in force, the husband was entitled to the whole surplus of the deceased wife's personal estate, and, if the policy is to be treated as the surplus of the personal estate of the wife, then the husband would have been entitled to the whole of it. If the insured had intended that her husband should have the entire amount, why did she say that ²⁷⁴ it was for the use and benefit of the husband and children? Had she desired that the policy should go to her estate, it could have been made (if the charter of the company allowed it to be so made) payable to herself or personal representative. To hold that the husband was entitled to the money collected under the policy is to utterly ignore the purpose of the insured, and the plain letter and spirit of the contract. In *McLin v. Calvert*, 78 Ky. 472, the court was considering a provision of the charter of an insurance company, wherein it was provided that the fund was for the benefit of the "widow and children" of the deceased member, and the court held that the fund should be distributed under the rule prescribed by the statute for the distribution of the surplus personalty of the intestate. Without stopping to deny or affirm the correctness of the rule enunciated in that case, or to indulge in an effort to distinguish that from this case, we say that we are here called upon to construe a contract which the insured made for the benefit of her husband and children. The covenant was that, upon the happening of an event, the society would pay, not the husband, but the husband and children, a given sum. We are of the opinion that the husband did not take the whole or one-half of the sum, but per capita with the four children surviving the insured. This entitled him to one-fifth of the fund. It is contended that, in the event the court holds that the husband did not take the whole or one-half of the fund, then he took one-sixth under the policy and one-sixth by inheritance. It could not

have been contemplated by the insured and the insurer that upon the death of one of the six beneficiaries that the insured would inherit ²⁷⁵ all or any of the interest which would have gone to such beneficiary had the deceased one survived the insured. Nor was it contemplated that the interest of one of the children at death should go to the father. It cannot be contended that had all the children died before the mother, except one, that the father would have taken five-sixths and the surviving child one-sixth of the fund. When one of the beneficiaries died, it reduced the parts one, into which the whole was to be divided. We think *Robinson v. Duvall*, 79 Ky. 85, 42 Am. Rep. 208, sustains our conclusion. In that case the court said: "It would be more consistent with his evident design in insuring his life for the benefit of all his family—wife and children alike—to suppose that his intention was that, in case one or more should die before himself without leaving children, the share to which those dying would have been entitled, had they survived him, should go to the survivors. He dedicated the whole to his family, share and share alike, and, as the family was reduced by death and he came to renew the policy by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived." It is contended that under the doctrine in *Overfield v. Overfield*, 17 Ky. L. R. 313, and *Clemens v. Hughes*, 13 Ky. L. R. 352, that as the father was poor and needed the money that came to his hands to support the children, other than the eldest, A. W. Kinneer, the security on his bond as guardian should not be compelled to refund it to the wards. When the guardian received the money, he had a two-horse team, with which, and his own daily labor, he endeavored to support his family. There is evidence tending ²⁷⁶ to prove that he made from one dollar and seventy-five cents to three dollars per day with the team until he sold it in the fall before his death, then the father worked at whatever he could get to do until two or three months before his death, when he was unable longer to labor for his own and his children's support. He did not own but rented a home. The second son, J. C. Kinneer, was sixteen or seventeen years old when his mother died. He did not only work for his own support, but gave from three dollars to five dollars per week to his father to aid in supporting himself and family. He was more than self-sustaining. The daughter, Ola, was fourteen years of age when her mother died. She did the principal part of the cooking and housework from her mother's death until her father died, and we think her labor fully

compensated her father for all he expended on her. We think, until he sold his team in the fall of 1892, his circumstances did not require he should spend any of his daughter's money for their support. More than one year before he sold his team he had spent all the money which came to his hands, and, so far as this record shows, very little of it was spent in the support of his family. The evidence is not satisfactory as to what he did with the money, yet, so far as it does show what he did with it, he used it in the payment of debts which he had contracted previous to its reception. For a month before his death, when he had ceased to labor, he and his family were in want, but their necessities were not relieved by the expenditure of his wards' money, but by the charity of his neighbors and his old comrades in the army. We think there is a failure to bring this case under the rule of the Overfield and Clement cases. Instead of adjudging that the husband was ²⁷⁷ entitled to two-sixths of the fund, the court should have adjudged that he was entitled to one-fifth of it.

The case is affirmed on the original and reversed on the cross appeal.

INSURANCE—LIFE—BENEFICIARIES.—The sum to be paid under an insurance policy is a gift from the insured, which vested in interest when the policy was delivered, and, the policy being in force at his death, vested in possession then: Extended note to Hooker v. Sugg. 11 Am. St. Rep. 722. Right of a beneficiary to be paid the insurance money on the death of the insured: See the monographic note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 564-570.

OMBERG v. UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

[101 KENTUCKY, 308.]

INSURANCE—ACCIDENT.—If the death of the insured is caused by blood poisoning, superinduced by the bite or sting of an insect, such death is caused through external, violent, and accidental means, within the meaning of an accident insurance policy.

INSURANCE—ACCIDENT—EVIDENCE.—In an action for loss under a policy of insurance against death by accident, a statement made by the decedent to his physician, upon which the physician forms his opinion and makes a prescription, is competent evidence to prove what was the actual cause of his illness and death, although the symptoms are such as might be produced either by disease or by the accident.

INSURANCE—ACCIDENT.—Death caused by blood poisoning, superinduced by the bite of an insect, is not the result of "poisoning in any form or manner," or "contact with poisonous substances," within the meaning of an accident insurance policy.

O'Neal & Prior, Phelps & Thum, and A. Selligman, for the appellant.

Humphrey & Davie, for the appellee.

³⁰⁴ **HAZELRIGG, J.** This is an action on a policy of insurance against bodily injuries and death effected through "external, violent, and ³⁰⁵ accidental means." The policy was issued by appellee company to Adolph Omberg, and in case of his death alone through the means indicated, the indemnity—five thousand dollars—was payable to his wife, who is here the appellant. Upon the conclusion of the trial below, it was the opinion of the court that there was a failure of proof to sustain the plaintiff's contention that her husband's death had been caused through the means and under the conditions provided for in the policy, and a peremptory instruction followed.

The vital question in the case is: Was the death of Omberg effected through "external, violent, and accidental" means, or was his death caused by disease?

Incident to this question is one respecting the competency of certain testimony offered by the appellant and rejected by the trial judge, conducing to show the nature and origin of the alleged accident, resulting, as she contends, in the death of the assured.

And still further is the question, whether, conceding that Omberg's death was the result of the bite of an insect, which produced septic poisoning, as is contended by appellant, payment of the policy is yet to be denied because the insurance was not to extend to or cover accidental injuries or death resulting "from poison in any form or manner," or "contact with poisonous substances."

And, first, was the death of the assured the result of a disease or of an accident? Omberg was a traveling salesman of Louisville, Kentucky, and a stout, healthy man of some forty-eight years of age. On or about July 20, 1893, while out on a business trip, he went to his sister's home in Rome, Georgia. He was very lame; his foot was swollen, and there was an ³⁰⁶ inflamed red spot on one of his toes, with a pimple or place in the center of the spot, presenting the appearance of a puncture or bite of an insect. He grew worse, complaining solely of his foot; within a few days, the 23d of the month, perhaps, a physician was sent for to treat his foot, who found "an abscess at the base of the fourth toe on the right foot, which was very tender and very much inflamed, with a good deal of redness over the whole top

and outside of the foot." The spot was about as large as a dime, "quite tender to the touch, with a very deep red color and considerably elevated." In the opinion of the physician, the place presented such an appearance as might have resulted "from the sting or bite of an insect." The physician opened the abscess on the day following his first visit, and there was a discharge of a quantity of "rather unhealthy pus." In about a week he had a very severe chill, followed by another some two or three hours later, accompanied with severe vomiting and followed by purging and persistent vomiting, which continued to his death, on the twelfth day of August. When asked from what his patient was suffering when he first saw him until his death, the physician answered "some septic poisoning," commonly called "blood poisoning"; and, further, that blood poisoning would cause the chills, vomiting, et cetera. He further testified that the immediate cause of death was the rupture of an aneurism in the abdominal region, and this was itself induced by the persistent and excessive vomiting. This witness further testified that the bites of insects, such as mosquitoes or flies, often caused blood poisoning, and he had often observed parts badly swollen from mosquito bites and bites from other insects; that he observed no traces of ³⁰⁷ any kind of disease in his patient from which he could judge he had heretofore suffered except dyspepsia or indigestion, and these would not have produced blood poisoning. These facts were obtained from a physician who had known the deceased some ten years. A consulting physician of some sixteen years' experience in infirmaries and hospitals was called in, and his testimony is corroborative of his colleague as to the presence of blood poison in the system of the patient. It further appears that the physician first sent for inquired of the patient, who was then only suffering from the inflamed spot on his foot, what caused the trouble, and was told by the patient that "a few days prior to this, early in the morning and before he got out of bed, the cover was thrown off his feet, and a mosquito bit him on the spot, and that he felt some uncomfortable feeling in this toe that prevented him from wearing his shoe."

This proposed evidence was rejected. It also appeared that Omberg made similar statements to his sisters when he came to their house in explanation of his lameness and the swollen condition of his toe and foot. These statements were also rejected.

The body of Omberg was brought to Louisville, where, in

about two weeks after his death and when the remains were badly decomposed and affected by the use of embalming fluid, an autopsy was held, which failed to disclose any evidence of blood poisoning, but, on the contrary, conduced to show that death had been caused by disease—namely, by the rupture of an abdominal aneurism—a disease shown to be of gradual development. This is in substance the case and the state of facts presented. The trial court instructed peremptorily for the defendant.

³⁰⁸ We think this was error. Whether the death of Omberg was caused by blood poisoning itself, superinduced by the bite or sting of some insect, was a question of fact for the jury; the affirmative of these propositions was supported by the evidence of the two attending physicians, and which is confessedly entitled to much weight. Even if we discard the statement of the patient that the spot on the foot was the result of the bite of a mosquito, we still have the condition of the inflamed part, which, in the opinion of an expert, presented such an appearance as might have been caused by the sting or bite of an insect. The jury might have reasonably concluded from this evidence that the injury to the toe was so caused, especially as such a condition is shown not to be an unusual result of such sting or bite. The jury might also have believed that death was caused by blood poisoning, induced by the sting or bite—they certainly might have so believed from the evidence of the attending physicians. When these conclusions on the facts are reached we are of the opinion that, as a matter of law, the death of the assured could be as truly said to have been effected through “external, violent, and accidental means” as though death had been caused by the sudden, unforeseen, and unexpected bite of a poisonous snake. The bite was external, violent, and accidental. If a bite at all it was certainly external. It came from without, and its marks were even visible to the naked eye. The force of it was not as great, perhaps, as if inflicted by a rattlesnake, but the means were not the less violent within the meaning of the policy. It was also accidental, because unexpected, unforeseen, and happened as by chance. It was not designed or brought about voluntarily. But for it the ³⁰⁹ blood poisoning and death would not have resulted. The blood poisoning was consequent on the wound; the bite would, therefore, be the proximate cause of death. Death from peritonitis induced by a fall is nevertheless said to have been due to the fall, unless the assured already had the disease when he fell: *Freeman v. Mer-*

cantile Mut. Acc. Assn., 156 Mass. 351. So as to erysipelas caused by a fall; and so as to blood poisoning caused by the hurt of a finger: *Martin v. Equitable Acc. Assn.*, 61 Hun, 467. Whether the fall or hurt in fact caused the peritonitis, erysipelas, or blood poisoning, were said to be questions of fact in the cases cited. We are of the opinion also that the declaration of the patient to his attending physician, to the effect that the injury was the result of a bite, was competent. A narrative of the events attending the mishap would not be competent, but the patient may tell what the injury is, if he knows; he is suffering and is seeking relief; to get it he must tell the truth; any other course would mislead his physician and might result disastrously; he knows whether he has bruised the inflamed parts or whether he has been bitten by an insect. Such statements are part of the description of the wound, and inseparable from the patient's complaint with respect thereto.

The case of *Dalbert v. Travelers' Ins. Co.*, 2 Cin. Rep. 98, is directly in point. This case is reported by Mr. Bigelow in volume 4, page 366, of his *Life and Accident Insurance Reports*, and the court (Judge Alonzo Taft) holds that, "in an action for loss under a policy against death by accident, a statement made by a decedent to his physician, upon which the physician forms his opinion and makes a ³¹⁰ prescription, is competent evidence to prove what was the actual cause of his illness and death, although the symptoms are such as might be produced either by disease or by the accident."

In that case, the insured became suddenly sick, and to his physician attributed his sickness to an injury to his back and side by a fall received when no one was present. The learned judge said: "I am satisfied that there is a tendency in the decisions of the present time to enlarge the range of testimony, especially when it is necessary to avoid a failure of justice. The statements of the history of his case made to his physician by a patient who is seeking relief from pain and severe sickness are entitled to credit. To state untruly to his doctor the cause of his sickness would be directly against his most vital interest in saving his health and life; in such case, the absence of a statement by the patient of such a cause of his sickness would be an important element in forming the physician's opinion. For if a patient did not refer to such an accident as the cause of his sickness, the doctor would necessarily conclude that the symptoms did not come from such cause": Citing *Fort v. Brown*, 46 Barb. 369; *Barber v. Merriam*, 11 Allen, 324. These cases

fully support the opinion. Mr. Bliss, in his work on *Life Insurance*, second edition, page 633, says: "In a case where an action was brought on an accident policy, the supreme court [evidently referring to the *Dalbert* case] passed upon the question of the admissibility of the declarations of the insured as to the injuries he had suffered, and the mode in which they were incurred. They held that the declarations of a party himself, to whomsoever made, are competent evidence when confined strictly ³¹¹ to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady to prove his condition, ills, pains, and symptoms, whether arising from sickness or from injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. So is a declaration made by a deceased person contemporaneously or nearly so with a main event, by whose consequence it is alleged that he died, as to the cause of that event. The views adopted in the cases cited from Ohio and Kansas seem most in accordance with correct principles." We are not disposed, however, for obvious reasons, to extend this doctrine so as to embrace declarations made to others than to the patient's physician.

We are further satisfied in this case that the death of the assured, if it occurred as claimed by the appellant, was not the result of "poison in any form or manner" or "contact with poisonous substances" within the meaning of those provisions in the policy. If so, then if blood poisoning were the immediate cause of death from an accidental gunshot, the clause would prevent recovery—a conclusion wholly at war with the manifest purpose of the contract.

So death from a rattlesnake bite is clearly from poison and contact with poisonous substances, but we presume no one will contend that recovery in such a death could be denied. Such causes of death as are last mentioned are not understood to be causes of death from poisoning or contact with poisonous substances in the ordinary meaning of those terms.

The judgment is reversed for proceedings consistent with this opinion.

Chief Justice Lewis not sitting.

INSURANCE—ACCIDENT—POISONING.—A death caused by accidentally taking poison is regarded as caused by external and violent means: *Note to Carnes v. Iowa State etc. Assn.*, 68 Am. St. Rep. 310; *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. St. 79, 27 Am. St. Rep. 618. Death of an insured person, caused by poison accidentally

taken by mistake, is not within an exception in a policy excluding liability if death is caused by "poison in any way taken, administered, absorbed or inhaled": *Metropolitan etc. Assn. v. Froiland*, 161 Ill. 30. 52 Am. St. Rep. 359, and note. But in *Early v. Standard etc. Ins. Co.*, 113 Mich. 58, 67 Am. St. Rep. 445, it was held that an insurance company, exempt, under an accident policy, from liability in case of death by poison, is not answerable for a death caused by poison accidentally administered.

NOONAN v. HASTINGS.

[101 KENTUCKY, 312.]

MECHANICS' LIENS—PUBLIC BUILDINGS.—A mechanic's lien against public buildings cannot be enforced by a sale of the property, when its use is necessary to the administration of governmental affairs.

MECHANICS' LIENS—SUBCONTRACTOR'S LIEN AGAINST PUBLIC BUILDINGS.—A subcontractor may assert a mechanic's lien against public buildings, so as to reach money in the hands of public authorities, in lieu of the improvements involved. The fund must stand in place of such property, and thus protect a subcontractor who gives notice as required by statute of the delinquency of the original contractor.

Hawkins & Hawkins, for the appellant.

H. W. Root, for the appellee.

313 HAZELRIGG, J. The question involved on this appeal is whether a subcontractor may assert the lien provided for by sections 2463 and 2467 of the Kentucky Statutes, as against public improvement made for a city. It is agreed on all sides that such a lien cannot be enforced by a sale of the property where its use is necessary to the administration of governmental affairs; but this was held, in *Roe v. Scanlan*, 17 Ky. L. R. 595, not to prevent the subcontractor from asserting such lien so as to affect and reach moneys in the hands of the county in lieu of the improvement there involved. In that case, the lien was said to attach to the fund in the hands of the county for the construction of a courthouse, and we perceive no reason why the same principle may not be applied in this case. The plain letter of the statute authorizes the filing and assertion of such liens, without regard to whether the building or structure be a private or a public work, and if public policy does forbid the enforcement of the lien by a sale of the property so improved, yet the fund may stand in lien instead of the property, and protection be thus afforded subcontractors who give notice as required by statute of the delinquencies of the contractor.

Here the appellant, Noonan, who was a subcontractor under

Hastings, gave notice to the city of his claim, and, under the statute, it was the duty of the city to withhold a sufficient amount to satisfy the claim.

314 The averment of Hastings' pleading is that at that time the city owed the contractor the sum of three thousand four hundred dollars on his contract, while appellant's claim was only the sum of twelve hundred dollars.

The judgment dismissing the appellant's petition is reversed for proceedings consistent herewith.

MECHANICS' LIENS—PUBLIC BUILDINGS.—The general rule is that public property and public buildings are not subject to mechanics' liens: *Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451. Unless the right is expressly conferred by statute, the term "all buildings" will not be held to include public buildings: *Atascosa County v. Angus*, 83 Tex. 202, 29 Am. St. Rep. 637. But in *McKnight v. Parish of Grant*, 30 La. Ann. 361, 31 Am. Rep. 226, it was held that a city jail built on public property was subject to a mechanic's lien in favor of the one who built it. And property of a municipal corporation not devoted to public use may be taken and sold to satisfy a judgment against the municipality: Extended note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 696. In *Wilson v. School Dist.*, 17 Kan. 104, it was held that though school buildings are exempt from execution, they may still be subject to a mechanic's lien under a statute giving a lien on any building; and though the lien may be incapable of enforcement, yet the provisions of the lien law may determine the relative rights and liabilities of the subcontractor, the contractor, and the school district: See the extended note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 697.

BOHON v. BROWN.

[101 KENTUCKY, 354.]

CONSTITUTIONAL LAW—PATENT RIGHTS—POLICE POWER.—A statute requiring persons who sell patent rights to have written across the face of the notes executed to them in consideration therefor the words "peddlers' note," is not in conflict with the patent laws of the United States, as an attempt to limit the patentee or his assignee in the disposition of the right secured to him, but is simply an exercise of the police power of the state to protect its citizens against fraud and imposition by itinerant persons.

NEGOTIABLE INSTRUMENTS EXECUTED IN VIOLATION OF STATUTE.—As a general rule, one who executes a negotiable note, knowing it is the subject of barter and sale in the commercial world, and does not put into it any words which give warning to others not to buy it, is estopped to make a defense after it has passed into the hands of a bank; but where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so, no matter into whose hands it may pass.

NEGOTIABLE INSTRUMENTS—"PEDDLERS' NOTE"—PLEADING.—If the statute requires that the words "peddlers' note" shall be written across the face of all notes executed for articles sold by peddlers or itinerant persons, and payment of a note in suit is resisted on the ground that it is a "peddler's note," and that the

statute has not been complied with, an answer which falls to allege that the payee of the note sued on was a peddler or itinerant person at the time of the sale of the article or execution of the note in contest is insufficient and subject to demurrer.

P. W. Hardin, for the appellant.

Clements & Thurman, for the appellees.

³⁵⁵ BURNAM, J. The complaint of appellant is based upon a promissory note executed by appellees Brown and Wells to Webb & Camp, which was made negotiable and payable at a bank in this state, and which was indorsed by the payees to one George Bohon, and was by Bohon discounted and assigned to appellant for value, before its maturity, it being a banking institution organized under the national banking laws of the United States.

Judgment is resisted by appellee upon the ground that ³⁵⁶ the note sued on was executed in consideration of the right to sell in twenty-five counties of the state, exclusively, what was represented to be "The Webb & Camp Patent Automatic Broom Holder," and upon the further consideration that the payees were to furnish promptly, upon order and at agreed prices, such number of the patented articles as might be desired by appellees in the business of selling; and they further allege that payees were never the owners of any such patent as the note was given for, and that the note was procured from them by false and fraudulent representations as to the ownership of the alleged patent, and by other fraudulent devices.

They further allege that under the statute, the note sued on having been executed for the sale of territory for a patent right, it should have had written across the face of it the words "Peddlers' Note," and not having such indorsement the note was null and void under the statute, and that appellant was not a purchaser in good faith, without notice, and before maturity of the consideration of the obligation sued on.

All the affirmative allegations of the answer were denied by reply. The law and facts were submitted to the chancellor for trial, and he made a separate finding of his conclusions of fact, holding that the proof showed that the note sued on was executed for the right to sell a patent automatic broom holder; that the payees, before maturity and for value, assigned it to Bohon, and that the proof further conduced to show that Bohon afterward assigned the note to plaintiff, after receiving full information of the consideration of the note and of all appel-

lees' alleged defenses, that ³⁵⁷ the note was procured by false and fraudulent representations, without valuable consideration, and that it was a peddlers' note and did not have indorsed across the face of it the words "Peddlers' Note," as required by law. And the chancellor held that the note was absolutely void, and dismissed the petition of appellant.

The appeal is from that judgment, and a reversal is asked on the grounds: 1. That section 4223 of the Kentucky Statutes is unconstitutional because it is in conflict with the patent laws of the United States, being an attempt on the part of the legislature to limit the right of a patentee, or his assignee, to dispose of a right secured to him by the laws of the national government; 2. Because the note sued on is, by the provisions of section 483 of the Kentucky Statutes, placed upon the footing of a foreign bill of exchange, and, having been discounted in good faith before maturity by plaintiff, appellees are estopped from denying liability.

1. Is the statute requiring persons who sell patent rights to have written across the face of the notes, executed to them in consideration therefor, the words "Peddlers' Note" in conflict with the federal laws? In our opinion it is not, and the statute is valid because it is only the exercise of a police power which properly belongs to the state. The right to prescribe regulations for the protection of its citizens against fraud and imposition is not taken from the state by the federal constitution, or by any national statute; on the contrary, it may be considered as having been authoritatively settled that the national government cannot exercise police ³⁵⁸ powers for the protection of the inhabitants of a state. These are local matters, and must be governed and regulated by the state: See *United States v. Dewitt*, 9 Wall. 41; *United States v. Reese*, 92 U. S. 214; *Munn v. Illinois*, 94 U. S. 113; *Civil Rights Cases*, 109 U. S. 3; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695; *Tod v. Wick*, 36 Ohio St. 370.

In the case of *Patterson v. Kentucky*, 97 U. S. 501, the court uses this language: "It is true that letters patent pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others his invention or discovery throughout the United States and the territories thereof. But, obviously, this right is not granted or secured without reference to the general powers which the several states of the Union unquestionably possess over their purely domestic affairs, whether of

internal commerce or of police. . . . By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. . . . State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided, expressly, or by implication, to the national government. . . . This court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of state regulation, established for the purpose and with the effect of destroying or impairing the rights secured by the constitution. It has, nevertheless, with marked ³⁵⁰ distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens."

Mr. Cooley says: "In the American constitutional system, the power to establish ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government." Cooley's Constitutional Limitations, 574.

There is nothing in this statute which discriminates against the sale of a patent right, nor does it usurp any power of the national government or violate any federal law, but it simply prescribes a method to secure the citizens of the state from being imposed upon by men who have either no authority to sell patent rights or no patent rights to sell; and it would be monstrous to assert that the vendors of patent rights cannot be restrained by reasonable police regulations, and we are, therefore, of the opinion that the provisions of the statute, being in the nature of a police regulation, are constitutional and valid.

Nor does this construction in any wise conflict with the adjudications of this court, in the case of *Commonwealth v. Petty*, 16 Ky. L. R. 488, which is referred to and relied on. There it was held that the act requiring persons selling, or offering to sell, patent rights, or territory for the use, manufacture, and sale of patent rights, to pay a license tax before making such sale, was unconstitutional and void, because, as stated by the learned judge: "If the legislature had authority to require the patentee or his assignee to procure ³⁶⁰ and pay for this privilege, there is no limit to the extent of such requirement, and the legislature

could fix this license fee so high as to destroy the commercial value of the right, and thus indirectly destroy the power which is in Congress by the federal constitution to promote the progress of science and the useful arts." In this case there is no discrimination against this particular species of property denounced by the statute, and no attempt to prevent its legitimate and proper sale, and it is a proper police regulation.

The state legislature has the right to say what paper may be placed upon the footing of a foreign bill of exchange. It is a privilege that has always been exercised, and is purely a creature of the statute. The legislature would unquestionably have the power to repeal section 483, which defines what manner of paper may be placed upon the footing of a foreign bill of exchange and deprive promissory notes of all the characteristics and privileges of such bills; and certainly it could not be contended in such a case that a promissory note executed in consideration of a patent right granted by the federal government would be entitled to any higher or greater privileges than any other promissory notes. The statute places no restriction on the sale of a patent right; it only attempts to prevent itinerant persons who are "here to-day and there to-morrow" from practicing frauds upon the ignorant and credulous.

Now, as to the second contention made by the defendant, what are the rights of appellant as the bona fide holder of the paper sued on? It may be stated as a general rule of law that one who executes a negotiable promissory note knowing that it is the subject of barter and sale in the ³⁶¹ commercial world, and does not put into it any words which would give warning to others not to buy it, is estopped from making defense to same after it has passed into the hands of a bank of this state, but there are exceptions to this general rule; and all the decisions agree that, where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so, no matter into whose hands it may pass.

This doctrine was laid down in the case of *Vallett v. Parker*, 6 Wend. 615, the court holding that: "Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but, where they are adjudged by the court to be so for failure or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with or have the notice of the consideration."

Mr. Daniel, in his work on *Negotiable Instruments*, draws this distinction very clearly. He says (section 197): "The

bona fide holder for value, who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition, which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule—that when a statute, expressly or by necessary ³⁶² implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it; though even upon such instruments an indorser may, as we shall hereafter see, be held liable. There are very few cases in which the statute renders such instruments absolutely void; and the most important, if not the only, instances now to be met with, are the statutes against usury and gaming.”

In the case of *Cochran v. German Ins. Bank*, 9 Ky. L. R. 196, the superior court held that: “A bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder,” and in the case of *Farmers’ etc. Bank v. Unser*, 13 Ky. L. R. 966, the court says: “The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value in all those cases in which he can point to an express declaration of the legislature that such an illegality makes the contract void,” referring to the cases of *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23; *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15; *Snoddy v. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 919; *Cochran v. German Ins. Bank*, 9 Ky. L. R. 196. “However,” the court in that opinion said, “though the note was based on a gambling consideration, the indorsers are liable, for they engaged that the note is a valid and subsisting obligation, binding on all prior parties according to their ostensible relations, and they will be held liable, although the instrument be entirely null and void as between the prior parties themselves, and also as between such prior parties and the bona fide holders ³⁶³ without notice,” referring to *Daniel on Negotiable Instruments*.

We therefore conclude that section 4223 violates no constitu-

tional rights of those selling patent rights granted by the national government, and that the legislature had the power to require the words "Peddlers' Note" to be written across the face of all notes executed for articles sold by a peddler, or itinerant person, as prescribed in section 4116 of the Kentucky Statutes, and to declare them null and void for failure to conform to this requirement. But the statute only requires the words "Peddlers' Note" to be written across notes given for articles sold by a peddler, or an itinerant person. It does not apply to a vendor who has a fixed place of business; the fact that the vendor was an itinerant person is a necessary allegation to sustain their defense.

There is no averment, either in the original or amended answer, that the payees of the note sued on were itinerant persons, or peddlers, at the time of the sale of the patent right or the execution of the note in contest. The allegation of the petition that the note "is what is denominated, under the laws of Kentucky, a peddlers' note," is a mere legal conclusion. And without this averment and proof of it the note is not void under the provisions of section 4223. The demurrer of plaintiff to defendant's answer should have been sustained for this reason. Nor does this fact appear anywhere in the record.

Wherefore the cause is reversed and remanded, with instructions to sustain the demurrer of plaintiff, allow defendants to amend if they desire, and for further proceedings consistent with this opinion.

PATENT RIGHTS—POLICE POWER.—Patent laws do not prevent a state from enacting police regulations for the protection and security of its citizens. Hence, statutory regulations concerning the transfer of patent rights, which are mainly designed to protect the people from imposition by those who have actually no authority to sell patent rights, or to own patent rights to sell, should be upheld: *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327. A state statute providing that any person who takes a written obligation in consideration of a patent right shall insert in the body of it, in writing or print, the words, "Given for a patent right," is a reasonable police regulation, designed to protect people against imposition and fraud, and is valid, because it does not usurp any of the powers of the government, or infringe upon the exclusive rights of the patentee: *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327. and note collecting the cases. Contra, see *Cranston v. Smith*, 37 Mich. 309, 26 Am. Rep. 514. and note thereto.

NEGOTIABLE INSTRUMENTS—STATUTORY REGULATION—PATENTS.—A promissory note taken by the vendor of a patent right who has not complied with the statute, which does not contain the words "given for a patent right," is inoperative as between the parties, and as to a purchaser with notice, unless he shows that

his indorser was a purchaser in good faith: *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40.

NEGOTIABLE INSTRUMENTS—STATUTORY REGULATION. Mercantile paper made void ab initio by statute is void in the hands of a bona fide holder: *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413.

SCHMIDT v. MITCHELL.

[101 KENTUCKY, 570.]

CORPORATIONS—MANNER OF ELECTING DIRECTORS.

Under a state constitutional provision for the election of directors in corporations by a cumulative system of voting, stockholders are entitled to vote under the mode prevailing before the adoption of the constitution, if they so desire. and an election of directors under such other mode is legal if no stockholder claims, or is denied, the right to vote under the cumulative system.

CORPORATIONS—EXECUTORS' RIGHT TO VOTE STOCK—REVOCATION OF PROXY.—The executors of an estate have the right to vote the corporate stock of their ancestor, and, if one of the executors is present and votes the stock of the estate at a stockholders' meeting, this is a revocation of a proxy to vote such stock given by his co-executor to a third person.

CORPORATIONS—PROXY TO VOTE STOCK—REVOCATION.—A proxy to vote corporate stock is always revocable, even when, by its terms, it is made irrevocable, nor is it necessary that it should be revoked in the exact manner provided in the instrument exacting the proxy.

CORPORATIONS—DIRECTORS—ELIGIBILITY OF EXECUTOR.—Although directors in a corporation are required by law to be stockholders therein, an executor who has the right to vote stock owned by his testator is eligible to the office of director.

CORPORATIONS—DIRECTORS, ELECTION OF—EFFECT OF VOTING FOR INELIGIBLE PERSON.—Votes cast for a person not eligible to the office of director in a corporation cannot elect him, and he does not become even a de facto director and may be ousted by legal proceedings; but votes cast for him cannot be ignored so as to elect another candidate who has received a minority of the votes cast unless those voting for the former know the facts which make him ineligible to office and that such facts render him so.

VENUE—APPLICATION FOR CHANGE OF.—An affidavit for change of venue, based almost entirely upon hearsay, and failing to state the facts upon which the belief is based that the accused cannot have a fair trial before the court where the affidavit is presented, is insufficient.

B. F. Buckner, B. Bacon, C. B. Seymour, and E. Macpherson, for the appellee.

P. F. Green and Humphrey & Davie, for the appellee.

576 DU RELLE, J. The Oregon Gold Mining Company was incorporated by articles filed in the Jefferson county court in October, 1885, its principal place of business being Louisville, Kentucky. It was the owner of a gold mine in Union county,

Oregon. More than half a million dollars had been invested in the stock and bonds of the corporation prior to October, 1893, but without profitable results. One mortgage of two hundred thousand dollars, another of forty thousand dollars, and another of thirty thousand dollars had been executed by the company upon its mines and property, and it had incurred a floating debt in addition. For the greater part of the period mentioned, Mr. George H. Dietz had been the president, Mr. A. L. Schmidt, treasurer, and Mr. H. W. Bohmer, secretary of the company. The charter provided for the annual election of a board of nine directors, which should elect a president, a secretary, and a treasurer.

⁵⁷⁷ At the election of 1892, Messrs. Dietz, Schmidt, Kelly, Houston, Mitchell, Wolters, Bohmer, Gerst, and Wolkup were elected directors, and Messrs. Dietz, Schmidt, and Bohmer were elected president, treasurer, and secretary, respectively. An election was held on October 17, 1893. There was dissatisfaction among some of the stockholders with the management of the company, and two tickets were nominated, one being composed of the former members of the board of directors and the other being the same ticket, with the exception that the names of Messrs. Zimmerman, Peter, and Neuner were substituted for those of Messrs. Bohmer, Gerst, and Wolkup. A certificate of election was given by Abner Harris, as chairman, and Frank A. Gerst, as secretary of the stockholders' meeting, that the gentlemen composing the new ticket were elected directors of the company. Messrs. Schmidt and Dietz claimed that the election was void, and that the old board of directors held over. Schmidt, Dietz, Houston, and Kelly were requested on several occasions to meet with the other five, who composed the new ticket, and organize the new board, but failed to do so. The other five thereupon held a meeting, to which the four mentioned were invited, but which they did not attend, and elected Wolters president, Peter treasurer, and Matthews secretary. Schmidt, Dietz, and Bohmer refused to recognize the members of the new ticket, and called no meeting of the old board.

On November 17, 1893, this suit was instituted in equity by Mitchell, Wolters, Zimmerman, Peter, Neuner, and some other stockholders against the company, Schmidt, Dietz, and Bohmer, setting up in substance the facts above stated, ⁵⁷⁸ and alleging that Dietz, Schmidt, and Bohmer had mismanaged the business of the company, and had thereby entailed, and would entail, great and irreparable loss and injury; that they had

charge of all the personal property, books, papers, et cetera, of the company, and control of its works; that the new board had been elected by a large majority of the stockholders, who desired a change in the management; that the officers selected by the new board had demanded possession of the books, papers, and moneys of the company, and control of its affairs, but had been refused; that by reason of the claim of two boards of directors and two sets of executive officers to the possession of the property, the company could not carry on business, make contracts, or operate its mines, and that the company would thereby be entirely wrecked and the value of its property wholly or in great part destroyed. It was further alleged that the old executive officers refused to give information concerning, or permit an inspection of, the books of account of the company; that only a small portion of the interest had been paid on any of the bonds, but that the interest had been repeatedly allowed to default, and that unless a receiver were appointed to take charge of the books, money, and property of the company, and manage it, proceedings for the foreclosure of the mortgages would be instituted, the property sold at a sacrifice, and the interests of the stockholders lost. Various specific instances of mismanagement were charged, and it was prayed that the defendants be enjoined from interfering with or preventing the new board from taking possession of the books, papers, and assets of the company, and for the appointment ³⁷⁹ of a receiver to take charge of the property until it could be placed in the hands of new officers.

Pending the hearing upon motion for the appointment of a receiver, an ad interim order was entered by the court of its own motion on December 11, 1893, that, during the pendency of the motion, neither party should cause any steps to be taken, or allow any application to be made in their names for the possession of the mines in Oregon, or for a receiver in Oregon or in any other court. On the same day, the appellant, Schmidt, who was trustee for the bondholders in the mortgages before referred to, instituted a suit in the Oregon court, seeking the appointment of a receiver there to take charge of the property of the company. On the thirteenth day of December, 1893, the trial court appointed a receiver and directed him to take charge of the books, papers, and assets of the company in Kentucky, and also to take possession of the property in Oregon. Proceedings for contempt for disobedience to the order of court were instituted against Schmidt and Dietz. Their right to appeal

from the order of injunction was denied by the trial court, and they resorted to mandamus proceedings to secure the right. The decisions upon the various appeals in regard to these questions are reported in the cases of Kelly v. Toney, 95 Ky. 338, Schmidt v. Mitchell, 95 Ky. 342, and Kelly v. Mitchell, 98 Ky. 218.

An immense mass of testimony has been taken in the case, and every point which could be raised has been elaborately and ably argued by counsel. But, as said by Judge Lewis in the opinion in the case last referred to: "The subject matter of controversy in this action is possession ⁵⁸⁰ and control, according to articles of incorporation, of the property and business affairs of 'The Oregon Gold Mining Company,' and is exclusively between plaintiffs, suing therefor as directors and executive officers, certain stockholders uniting with them, and defendants, who, as incumbents, plead an adverse claim. And thus was formed the single issue in the action of title to the offices. Consequently, the only determinate judgment the lower court had jurisdiction to render in favor of plaintiffs, if any at all, is that those of them so indicated in the petition constitute the legal board of directors and of executive officers, and are entitled to the possession and control."

The first ground of reversal urged on behalf of appellants is that the election was not held by the cumulative system of voting; that the present constitution, section 207, provides that, in all elections for directors of any corporation, the system of cumulative voting shall be adopted, and that directors or managers of corporations shall not be elected in any other manner; and that, in pursuance of that section, the general assembly adopted an act providing for taking such votes upon the cumulative system. It is unnecessary for us to consider or pass upon the question which is raised by appellees, whether this section of the constitution and the act passed in pursuance thereto were not prospective in their nature, and applicable only to corporations thereafter created, or which should thereafter adopt provisions of the new constitution. It is only necessary to say that, under the cumulative system of voting, stockholders are entitled to vote in the mode which prevailed before the adoption of that system, if they so desire. That is to say, ⁵⁸¹ a man holding ten shares of stock in this corporation could either cast ten votes each for nine candidates for election to the board of directors, or he could cast ninety votes for one candidate. It does not appear that any stockholder claimed the right to cast

his vote upon the cumulative system, and no stockholder was required to vote his stock cumulatively, unless he so desired. It appears that the appellants themselves were present at the election, and did not claim the right to vote their stock cumulatively or object to the right of any other stockholder to vote according to the old method. We therefore conclude that the manner of holding the election was legal, inasmuch as no stockholder was denied the right to vote his stock cumulatively.

The next question presented for decision is as to the casting of the vote of the stock belonging to the estate of Jacob Peter, deceased. It appears from the evidence that Jacob Peter left a will, in which he appointed three executors—the appellee, George L. Peter, Henry Peter, and George W. Lewman. By the will one hundred and twenty-four thousand dollars of stock in this company was devised to six children, one of whom was appellee, George L. Peter. At the time of the election in October, 1893, the stock had not been distributed by the executors. Neither Lewman nor Henry Peter were present at the election. On March 4, 1893, Lewman had given to Dietz a proxy to vote the stock held by him as executor at meetings of the company; but it appears that, a few days before the election, Lewman and Henry Peter united in a proxy to George L. Peter to vote the stock held by the estate at the election in question. Dietz presented his proxy, but Mr. Peter being present, and claiming the right as executor to vote the stock, ⁵⁸² Dietz withdrew his claim (it is now claimed temporarily, and with the right reserved to revive it at a future time), and made no objection to Peter casting the vote of the stock belonging to the estate. It was accordingly cast by Peter, and counted in the tabulation of the vote.

In Cook on Stockholders, section 612, it is said: “An administrator or executor may vote on the stock of the deceased stockholder, even though such stock has not been transferred to the executor or administrator on the books of the company.”

It is conceded by counsel for appellants that it is clear that the executors have power to vote the stock of their testator at all elections, being the personal representatives of such decedents, and that until a settlement and division of the estate the stock of a decedent belongs to his personal representative. But it is claimed that, while the office of executor may be filled by more than one person, all the executors make but one officer; and that, therefore, Peter had no right to revoke a proxy

given by his coexecutor Lewman, and that Lewman's proxy produced by Dietz at the election should have been regarded as of at least as much weight and authority in regard to the Peter stock as the action of George L. Peter. It is also claimed that the fact that George L. Peter had in his possession a proxy from his coexecutors, authorizing him to cast the vote of the estate, would not avail, because he failed to produce it at the election. As to this, we are of opinion that if Lewman, as executor, had authority to issue a proxy on behalf of the estate, his coexecutor had equal authority to revoke it. George L. Peter was the only one of the executors ⁵⁸³ in attendance at the election; so far as that election was concerned he represented the estate. No objection was made to his casting the vote of the stock belonging to the estate. He was permitted to cast that vote, and was in possession of written authority to do so from his coexecutors. We have been referred to the case of *Tunis v. Hestonville R. R. Co.*, 149 Pa. St. 70, in which there was conflict between three executors, all of whom were present at the election, as to how the vote of the estate should be cast. It was there held that, as the executors were joint owners, one joint owner could not vote it against the protest and objection of his co-owner, and therefore the stock could not be voted at all. In this case, there was no conflict between the executors. The joint owner present at the election had, in the absence of his co-owners, the right to vote the stock; and such vote by the executor who was present was a revocation of the proxy theretofore given by his coexecutor. Nor can we concur in the contention that the provision in the proxy given to Dietz by Lewman, that it should remain in force until "revoked by me by giving the secretary of said company notice over my own signature that it had been revoked," rendered the proxy irrevocable, except in the mode prescribed. "A proxy is always revocable. Even when by its terms it may be irrevocable, the law allows the stockholder to revoke it": *Cook on Stock and Stockholders*, sec. 610. A proxy holder is a mere agent. His powers exist only at the will of his principal, and may be revoked by the latter at any time. It is immaterial whether an agent is engaged for a definite term or not, as the agency and the contract of hiring are entirely distinct. The authority may ⁵⁸⁴ be withdrawn, even though the party would remain liable upon his contract of hire. And we think it is not essential that the mode provided in the appointment of the agent for the revocation of his authority should be strictly followed. We are of opinion, there-

fore, that the casting of the vote on the stock belonging to the Peter estate by George L. Peter was legal.

The next question presented for decision is whether George L. Peter was eligible to election as director. He held no stock in his own name upon the books of the corporation, but was entitled as devisee to one-sixth of the stock belonging to his father's estate. The law seems to be well settled, as contended for by appellant, that until distribution the stock of a decedent is unadministered assets in the hands of the personal representatives, and the legal title is in them. It is unnecessary, in our judgment, to consider the distinction claimed on behalf of appellees between the necessary qualifications of a voter at a corporate election and the qualifications required to make one eligible as director. It is said in *Cook on Stock and Stockholders*, section 623: "An executor may be a director. If the charter or statutes require a director to be a stockholder, one who holds stock transferred to him in trust for the express purpose of qualifying him for the position may serve. And where a person has the right to vote on stock as a stockholder, he is eligible to any corporate office to which any stockholder is eligible, and accordingly may be elected a director, even though an assignee in bankruptcy has been appointed of his estate."

We see no reason why a fiduciary may not become a director of a private corporation. If the law were otherwise, ⁵⁸⁵ it might result in the corporation being unable to elect qualified directors, by reason of the fact that the total stock was held by fiduciaries.

The next question for decision is as to the election of Neuner. It is conceded that F. A. Gerst received more votes than Neuner. Mr. Gerst's father is conceded to have been a stockholder in the company at the time of his death. We have found nothing in this record to show whether the elder Gerst left a will, or whether administration was granted of his estate. There is no evidence of ownership by F. A. Gerst of any stock in the corporation. Mr. Gerst was, therefore, ineligible. It was alleged in the reply, and is uncontroverted, that at the election appellant Dietz objected to F. A. Gerst, Jr., being elected as a director, on the ground that he was not the owner of any stock; that Dietz and Bohmer (who was a defendant in the lower court) each produced affidavits, in which they swore that he was not the owner of any stock, and that he was thereupon held not to be eligible, and that appellant Dietz, who received a less number of votes than Gerst, and Neuner, who also received a less

number of votes, were declared elected directors; that Gerst never claimed or asserted any right to the position, and has acquiesced in the election of Neuner as director. It appears from the evidence that Gerst not only acquiesced in the ruling that he was ineligible, but as secretary of the stockholders' meeting certified to the election of Dietz and Neuner; and it is very earnestly claimed by appellees that, while in corporate elections the general rule is as given by McCrary on Elections, section 633, that votes cast for a disqualified or ineligible candidate are not thrown away, so ⁵⁸⁶ as to make the election fall on a candidate having a minority of the votes (especially if it is not shown that the stockholders casting such votes had knowledge of the fact which rendered the candidate voted for by them ineligible and disabled from holding office), nevertheless, where the voters are told that the person for whom they voted is ineligible, they must be considered as throwing away their votes, and the eligible candidate receiving the highest number of votes is elected. A number of authorities are cited in support of this doctrine, among which are Cooley's Constitutional Limitations, sixth edition, note on page 780, where it is said: "But it has been held that, when ineligibility is notorious, so that the electors must be deemed to have voted with full knowledge of it, the votes for an ineligible candidate must be declared void, and the next highest candidate is chosen."

In Dillon on Municipal Corporations, fourth edition, section 196, note, it is said, quoting *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508: "But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus effectual, must be brought home so clearly to the knowledge or the notice of the elector as that to cast a vote therewith indicates an intent to waste it, in order to render his vote a nullity."

In the case quoted in Dillon (*People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508) it was said: "Those who, knowing that a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for anyone for that office. . . . No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in parliament, his vote would be thrown away. There the ⁵⁸⁷ fact would be notorious, and every man would be presumed to know the law upon that fact."

In Beach on Private Corporations, second edition, section 300, it is said: "Votes cast for a candidate who is ineligible may not

be discredited so as to give the election to a candidate having a minority of votes, unless the electors knew of the ineligibility of the candidate voted for."

In this case it appears from the evidence that Gerst was very active in his opposition to the old board, and that Dietz and Bohmer were very much opposed to his election as director, and gave ample notice to the stockholders voting that he was ineligible by reason of the fact that he was not a stockholder. Whether the rule of law which would exclude him from the directory on that account was brought home to the stockholders is a more serious question. It was ruled by the officers of the meeting that he was ineligible. He acquiesced in that ruling, and certified to the election of Neuner, who—as the vote of the Peter estate is held to have been legally cast—received the next highest number of votes. It is true that, according to the testimony of Wolters, Gerst delivered to him his resignation as a director; and this is urged as a claim by him of right to the office; but it seems more probable that it was an attempt on his part to emphasize the fact that he did not claim the office. Nevertheless, the question is not what Gerst consented or agreed to, but what was the real result of the election held. In Morawetz on Private Corporations, section 485, it is said: "It has been held that votes cast for a candidate who is disqualified for the office will not be thrown away, so as to make the election fall on a candidate having a minority of ⁵⁸⁸ votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was, for that reason, disabled by law from holding office."

In the text of Cook on Stock and Stockholders, section 623, the law is thus stated: "Votes cast for a person not eligible to the office cannot elect him. He is not even a *de facto* director, and he may be ousted by legal proceedings. Such votes, however, are not to be ignored so as to elect a candidate who received a minority of all the votes cast."

In the case of *Queen v. Mayor*, L. R. 3 Q. B. 629, it was held that, although the electors had actual notice of the fact which had been adjudged to disqualify, nevertheless knowledge on their part of the adjudication could not be presumed. It was there said: "It is not enough to show that the voter knew the fact only; but it is necessary to show sufficient cause to raise a reasonable inference that he knew that the fact amounted to a disqualification. It could not be said in all cases that the

mere knowledge of a fact which in law disqualifies a candidate must be taken to be a knowledge of all the accompanying circumstances. We think that the rule is this: The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home as to imply a willingness in acting, when acting is in opposition to actual impulse to save the vote and make it effectual. ⁵⁸⁹ He must act so in defiance of both the law and the fact and so in opposition to his own open knowledge that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied." And see 1 Dillon on Municipal Corporations, sec. 196, and authorities there cited.

From the authorities mentioned we have concluded, though with considerable hesitation, that the stockholders in this company were not bound to know that the fact, of which they had notice, that Gerst held no stock in his own name, rendered him absolutely ineligible as a director; and that we must not assume them to stand in the same attitude as a voter who, having notice of an election, deliberately refuses to exercise the right of suffrage. Nor can we agree with counsel for appellee that Neuner was a *de facto* director for the purposes of this litigation; and that, therefore, his acts, including the election of Wolters, Peter, and Matthews, were valid and bound the corporation. This was a direct proceeding by one set of officers, claiming to be the legal and *de jure* officers of the company, to obtain possession of the books and papers. The other set of officers were actually in the exercise of the powers and duties of the offices claimed by them. In a proceeding affecting the rights of third persons, they, and not the appellants, would be the officers *de facto*. There had been no ratification or acquiescence on the part of the corporation up to the date of the order appointing the receiver in this state; the old officers had been "allowed by the proprietors of the corporation to take control of its property and to exercise its functions and powers": Morawetz on Private Corporations, secs. 638, 640.

⁵⁹⁰ We do not think the doctrine as to so-called *de facto* officers has application in a direct proceeding to try the title to the offices. It follows, therefore, that only four of the directors who met and attempted to elect officers were entitled to vote, and they did not constitute a quorum of the board of directors.

It was, therefore, error to hold that Wolters, Peter, and Matthews were elected to fill the executive offices of the company.

It does not follow, however, that the old board of directors held over. Eight directors were undoubtedly elected at the election of October, 1893, and these constituted the governing body of the corporation: Cook on Stock and Stockholders, sec. 609, referring to *People v. Fleming*, 37 N. Y. St. Rep. 157, 13 N. Y. Supp. 715. A vacancy existed in the board elected, which could be filled either by the directors, under the provisions of the charter, or by holding a new election by the stockholders.

The effect of docketing this case by mistake in the law and equity court, instead of in the chancery court to which it had been assigned by lot, has been passed upon in the former appeal (*Kelly v. Mitchell*, 98 Ky. 218); and we think that the power of the trial court to appoint a receiver in a case where violent internal dissension existed in the corporation, and two sets of officers were struggling for the right to administer the affairs of the company, was also passed upon in the petition for rehearing upon that appeal. In this behalf we do not feel authorized to hold that the lower court abused its discretion.

We find in this record a mass of testimony and argument in regard to accounts of the officers who had managed the affairs of the corporation up to the bringing of the suit. ⁵⁹¹ There being no issue in regard to these matters, they should all be disregarded as irrelevant.

An amended answer was filed by appellants in the lower court, stating specifically the legal vote cast at the election, as claimed by them; and it is claimed that, as no traverse was filed to this amendment, it is conclusive. It, however, if not a pleading of the evidence relied upon to prove the averments made in the original answer, was a substantial reiteration of the averments thereof in more elaborate form, and no additional denial was required: *Preston v. Beall*, 14 Ky. L. R. 61; *Macklin v. Trustees*, 13 Ky. L. R. 93; *Robinson v. Williamson*, 7 Bush, 604; *Newman's Pleading and Practice*, 717.

Immediately after the institution of proceedings for contempt an affidavit was filed by Schmidt and Dietz, under section 968 of the Kentucky Statutes, which provides that: "If either party file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties, by agreement, may select one of the attorneys of the court to preside on the trial, or hear the application, or hold the

court for the occasion; and, on their failure to agree upon an attorney, the attorneys of the court who are present and not interested, nor employed in the case, shall elect an attorney of the court then in attendance, having the qualifications of a circuit judge, to hold the court for the occasion, who shall preside accordingly."

In the case of *German Ins. Co. v. Landram*, 88 Ky. 434, this court held that, where such an affidavit is filed, it becomes the duty of the judge to pass upon the ⁵⁹² sufficiency of the affidavit, and to determine whether the facts stated in the affidavit make it improper for the presiding judge to try the case. It was there held that it was insufficient to state that the party making the affidavit believed he could not obtain a fair and impartial trial, and the court said that: "If the charges are false, they should be made in such a manner as would subject the party making them to criminal punishment. The fact or facts upon which the belief that the judge will not give the litigant a fair trial should, and must, be stated in the affidavit, and they must be of such a character as shall prevent the judge from properly presiding in the case."

A careful examination of the affidavit filed in this case shows that the averments are based almost entirely upon hearsay, and that it is not drawn in conformity with the rule laid down in *German Ins. Co. v. Landram*, 88 Ky. 434. We do not feel authorized to hold that, in deciding this affidavit to be insufficient, there was an abuse of judicial discretion by the trial court.

For the reasons stated the judgment is reversed and the case remanded, with directions to set aside the judgment, and for further proceedings consistent with this opinion.

CORPORATIONS—PROXY TO VOTE STOCK—REVOCABILITY. The power to vote stock in a corporation is inherently annexed to, and inseparable from, the real ownership of each share, and can only be delegated by proxy with power of revocation: *Harvey v. Linville Imp. Co.*, 118 N. C. 693, 54 Am. St. Rep. 749. But in *Smith v. San Francisco etc. Ry. Co.*, 115 Cal. 584, 56 Am. St. Rep. 119, it was held that a proxy might be made irrevocable for a term of years as the result of a contract between the purchasers of stock in the corporation that a majority of them, or their survivors, shall vote it as a unit during such term. This decision is criticised in the extended note to the same case.

CORPORATION STOCK—EXECUTOR'S RIGHT TO.—Shares of stock in a corporation owned by a decedent at the time of his death are personal property, and upon his death descend to his heirs-at-law, subject to the right of his administrator to subject the same to sale in the manner prescribed by the laws of the state: *Citizens' etc. Ry. Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445. Upon the decease of an intestate and the granting of administration, his

personal estate, and all contingent as well as absolute interests therein, vest in his administrator, including his bonds, contracts, and choses in action, as well as his goods and chattels, and can be devested only by operation of law, or some act of the administrator: *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551.

CORPORATIONS—DE FACTO DIRECTORS.—The acts of a director of a corporation are valid so far as the interests of third persons are concerned, though he is not possessed of the qualifications required by the by-laws of the corporation, if his election appears of record and he has been permitted by the corporation to act as a director: *Despatch Line v. Bellamy etc. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

VENUE—CHANGE OF.—The fact that an impartial trial cannot be had must be clearly established as a ground for changing venue, and a mere statement under oath that the party believes that a fair and impartial trial cannot be had on account of popular excitement and false reports is insufficient: *Extended note to Shattuck v. Myers*, 74 Am. Dec. 244.

LYNN v. HALL.

[101 KENTUCKY, 728.]

WILLS—CONSTRUCTION OF DEVISE.—Under a will by which the testator gives to his daughter-in-law, naming her, and to her children a certain tract of land, her children born after the death of the testator take per capita with those who were born previously to his death, if there is nothing in the will to indicate that such after-born children were intended to be excluded.

O. H. Waddle and G. W. Shadoan, for the appellant.

728 **PAYNTER, J.** On the 9th of July, 1866, James Lynn made his will. On the 14th of August, 1868, it was probated in the Pulaski county court. The clause in his will disposing of his estate is as follows: 729 "I give to my daughter-in-law, Polly Jane Lynn, and her children, wife of my son, Joseph Lynn, my tract of land on Clifty creek, Pulaski county, Kentucky, containing one hundred acres, sold and deeded to me by John Lay, the same on which I now live, in consideration of the love and affection I have for her and in consideration of her kindness to me heretofore. I have heretofore given to and made such provisions for my other children as I am able to do for them. I require of her to see that I am buried in a decent and Christian-like manner after my death."

It will be observed that he devised to Polly Jane Lynn, wife of his son, Joseph Lynn, and her children a certain tract of land. It appears from the language used in the will that his son Joseph was then living, and, as it does not appear in the

record that he has since died, presumably he is the father of the three children hereafter named who were born after the death of the testator. At the death of the testator Polly Jane Lynn had five children; afterward, there was born to her three children, one of whom was the appellant, Milton G. Lynn. The court below interpreted the will so as to give the land to the mother and the five children who were living at the death of the testator. If the three children born after the death of the testator are entitled to anything, they did not acquire it by inheritance or by any provision of the statute, as the father was living at the death of the testator and he was excluded by the terms of the will like the other children from participating in his estate. Nor would they any way have taken by inheritance anything from the grandfather's estate as their father was living at the death of the testator. So whatever rights ⁷⁴⁰ the children have in the land is by virtue of the will of their grandfather. There is nothing in the record which indicates the testator had any reason for or desire to exclude the children which might be born to Polly Jane Lynn after his death from taking an interest in the land. They were as much objects of his bounty and solicitude as those who were in esse at the time of his death. There being nothing in the will showing any intention to exclude such children from participation in the estate devised, we are of the opinion that the children who were born after the death of the testator take per capita with those who were born previous to the death of the testator.

In *Williams v. Duncan*, 92 Ky. 125, it appeared that the testator willed certain property interests to his grandchildren. The question arose as to whether the grandchildren who were born after the death of the testator participated in the estate devised. The court held that they did not, except those born within the period of gestation, because the will manifested a purpose to exclude them from participation. It is inferentially determined in that case, had no intention been manifested by the provisions of the will to exclude them, the children born after the period of gestation would have taken the same as those who were living at the testator's death. In *Webb v. Holmes*, 3 B. Mon. 404, the property was deeded to a mother for life, and the remainder to her children, the court held that those of her children who were born after the deed acquired the same interests in the property as those who were born before.

The judgment is reversed for proceedings consistent with this opinion.

WILLS—CONSTRUCTION—CHILDREN.—In regard to all bequests to a class, all who are embraced in the class at the time when the bequest takes effect will be allowed to take. And consequently, as an interest devised under a will ordinarily takes effect at the death of the testator, unless some other time be appointed for it to come into operation, will be so regarded, and the class ascertained as of that time. A legacy to the children of A, to be divided equally among them, and, if either of them die before twenty-one, their share to go to the survivors, creates a vested interest in the children living at the testator's death, subject to be divested in the event pointed out, and after-born children were therefore excluded: Extended note to *Loockerman v. McBlair*, 46 Am. Dec. 666. A devise to "children" of the testator's son comprehends only the children living at the testator's death: *Shotts v. Poe*, 47 Md. 513, 28 Am. Rep. 485. Where there is an intermediate estate, and therefore the vesting is postponed until a period subsequent to the death of the testator, every person answering to the description at the time fixed for the vesting will be entitled: Note to *Loockerman v. McBlair*, 46 Am. Dec. 667. The principal case seems opposed to the weight of authority.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

CUMBERLAND TELEPHONE AND TELEGRAPH Co. v.
MORGAN'S LOUISIANA & TEXAS R. R. Co.

[51 LOUISIANA ANNUAL, 29.]

CARRIERS—DUTIES AND OBLIGATIONS—ENFORCEMENT OF.—If a corporation undertakes to operate a railroad franchise, it assumes all the duties and obligations which spring by law from the character of its business and from the customs incidental to it. It tenders a continuing offer to the general public that it will perform these duties for the benefit of each and every one of them, when demanded, and, when any member of the public makes a demand upon it under such general offer, there immediately results a civil obligation on the part of the company, in favor of the party making the demand, enforceable through the usual legal remedies by which contracts are enforced.

CARRIERS—DUTIES AND OBLIGATIONS—ENFORCEMENT OF BY MANDAMUS.—A person to whom a common carrier owes a specific obligation, which it refuses to perform, may seek to enforce such obligation by proceedings in mandamus, and cannot, to the exclusion of that remedy, be driven by the corporation to an action for damages, nor can the latter, by the payment of money, leave unperformed a specific affirmative legal duty.

CONTRACTS IN RESTRAINT OF TRADE.—A contract between a railroad and a telegraph corporation to which the former has granted the exclusive right of way over and along its line of road, that it will not transport men or material for the construction, maintenance, or operation of a competing line of poles and wires, except at and for the railroad company's local rates, nor furnish for any competing line any facilities or assistance, or stop its trains to distribute any material at any other than regular stations, if it can lawfully withhold doing these things, is in restraint of trade, contrary to public policy and void.

Clegg & Quintero, for the appellant.

Darb & Kernan, for the appellee.

³⁰ NICHOLLS, C. J. The plaintiff applied in the district court for a mandamus commanding the defendant to receive, transport, and deliver poles, wires, cross-arms, et cetera, offered to be shipped by it on the line of the latter's railroad from Boutte station to Morgan City, Louisiana, and to deliver the same in the swamps along the line of the defendant, between the said termini. That the right of the railroad company to regulate the time, order, and manner of delivery, so as not to conflict with its other business, be protected by said judgment, and its right to demand and receive from plaintiff the usual, just, and proper freight charges for said service be also reserved.

The application was based upon allegations that plaintiff was actually building a telephone line from New Orleans to Morgan City, for the service of the public. That to erect said line it required poles, wires, and cross-arms. That said line was being built along the line of the defendant's company, between Boutte station and Morgan City, ³¹ but on plaintiff's own right of way. That from Boutte station to Morgan City a large portion of the line was through inaccessible swamps, and it was customary with said railroad company to receive the said poles and other materials, and deliver the same in said swamps between stations where needed. That plaintiff had requested this service of the defendant, had offered to pay the just and proper charges of freights for so doing, and defendant had refused to receive and carry the freight. That said freight was to be shipped at New Orleans, and at Boutte station. That defendant was properly equipped for the carriage of the same, had done so for other corporations, and did not place its refusal upon the ground that it had stations to which to carry the same. That defendant's refusal to receive and carry said freight was arbitrary, and operated to suspend the building of plaintiff's line; that defendant was a public carrier, organized under the law of Louisiana, and domiciled in New Orleans; that it was bound by law and by its charter to render the services to all the public alike. That plaintiff was without a remedy except by mandamus, and said railroad company should be ordered, after hearing, to receive, carry, and discharge the said poles, wires, and cross-arms offered to it by plaintiff, from swamps along the line of its road from Boutte station to Morgan City. The court ordered an alternative writ of mandamus to issue.

The defendant answered, under benefit and reservation of a

prior peremptory exception, that plaintiff's petition disclosed no right or cause of action. Defendant further excepted that plaintiff prayed the enforcement of no duty which was defined by law, and sets forth no right which was granted by law and which was free from doubt. In its answer, defendant admitted its creation by act of the general assembly of Louisiana, of the 8th of March, 1877.

It admitted that it owned a railroad and a right of way between Boutte station and Morgan City, but it averred it did not operate the said railroad, and did not for its own account receive, transport, and deliver freight along said railway. That said railway and appurtenances were operated by the Southern Pacific Company, a corporation erected under the laws of Kentucky, the railroad and its appurtenances having been delivered to the last-named corporation under a contract of lease, and respondent had not the right or power to make any contract respecting the receiving or transferring of freight upon ^{or} or along the said railway, but that such contracts, as well as the management of said railway, were undertaken by the Southern Pacific Company, and were within its powers. Respondent denied that a large portion of its line was through inaccessible swamps between Boutte station and Morgan City, and denied that it was customary for said railroad, or its lessee, to receive telegraph or telephone poles, or other material or any other freight, and to deliver the same in said swamp between regular stations. Respondent averred that within the past twelve months, between the aforementioned stations of its line, there has been erected through the swamp characterized as inaccessible by plaintiff a telegraph line requiring the use of poles, wires, and cross-arms, and in all respects similar to that which plaintiff is about to erect. That the Postal Telegraph Company had erected along defendant's right of way, through this same swamp, between Boutte station and Morgan City, and was then operating, a telegraph line composed of material similar to and of the same character as the poles, wires, and cross-arms used and to be used by the plaintiff, and the same was erected without the extraordinary aid of respondent, such as is demanded by plaintiff, and respondent did not receive said poles or other material of the Postal Telegraph Company, and deliver the same in the swamp between the aforesaid stations.

Respondent denied that it had done for other corporations or for any corporation what was demanded of it by the plaintiff.

Respondent denied that its refusal to receive and carry the said freight as described in plaintiff's petition was arbitrary, or that such refusal operated practically to suspend the building of plaintiff's line. Respondent averred that between Boutte station and Morgan City, in the so-called inaccessible swamp, there were on defendant's line fifteen sidings or sidetracks and stations, the longest distance between these stations and sidings being less than six and one-half miles, and the shortest being less than one and one-half miles. The distance between Boutte station and Morgan City being fifty-six and one-half miles, there was one siding then to every three and sixty-three one-hundredths miles.

Respondent averred that there were operated upon its line on each and every twenty-four hours fourteen regular schedule trains (four of which carried United States mail), passing to and fro between Morgan City and Boutte station. That between these named stations there was a large number of irregular trains necessary for the proper conduct of the business, and for the transcontinental traffic which ²³ passed along respondent's line, which number varied, but was rarely less than eighteen trains, and that during the month of September, of the year 1896, the number of trains passing along the line between Boutte station and Morgan City averaged eighteen trains for the month of September, and twenty-two and eight-tenths for the month of October, each twenty-four hours, and there was reason to believe, and respondent believed, that it would be necessary to operate so large a number of trains during the months of September and October, in the year 1898; and that thereafter, during the months of November and December, of the year 1898, it would be necessary to operate a large number. And that to undertake, receive, transport, and deliver the poles, wires, and cross-arms, and other material of defendant in the swamps, between stations, would require the equipment and operation of a special train, and special force of men, and would require the modification of schedules, and of existing arrangements for the operation of trains, and the other business along the whole line of defendant's railway.

That, in the face of these conditions, it was unusual and extraordinary for plaintiff to demand that the material for its proposed line should be delivered between regular stations; and that there was no usual or proper charges for such services fixed by law, by custom, or by contract. That it was under no legal

duty or obligation to receive and deliver in swamps, along the line of its railway between the stations aforesaid, except at regular stations, any of the material of the plaintiff, and that, if it should undertake to do so, or agree to do it, such undertaking would be a matter of contract; the terms and conditions of such contract must be fixed with reference to the situation, all the circumstances of which, in this or any like judicial proceeding, could not be brought to the knowledge of the court, and it was, therefore, beyond the power of the court to coerce respondent into the making of the contract with the plaintiff, and to compel respondent by mandamus to perform a service, the conditions of which could not be known to the court, or be expressed in its writ. Respondent averred that it had never delivered along the line of its railway between stations any poles, wires, or cross-arms for the construction of telephone or telegraph lines, nor had the same been delivered by its lessee, except for its own use and needs, and in the performance of its contract obligations with the Western Union Telegraph Company, by ²⁴ which contract the Southern Pacific Company, in order to erect, for the use of the system of railways, of which respondent's railway was a part, and in order to obtain the use of telegraph lines elsewhere, all necessary for the proper conduct of its own business, undertook to receive and to erect poles, and to receive and to string wires, and, generally, to erect, repair, and maintain a telegraph line along the line of respondent's railway, without which telegraph line and the use of other telegraph lines, acquired by the erection of its own, respondent's and the Southern Pacific Company would be wholly unable to perform their duty as common carriers, and that by the stipulations of the contract aforesaid, for the erection, repair, maintenance of its own lines of telegraph, the Southern Pacific lessees, as aforesaid, bound itself (and respondent was thereby bound) to keep, as to poles, wires, cross-arms and the like, the general rule of railways as common carriers namely to receive and deliver freight only at regular stations, and the Southern Pacific Company specially bound itself not to distribute material for telegraph and telephone lines at other than regular stations, which contract and stipulation it was lawful for the Southern Pacific to make, and which contract could not be set aside, and ought not to be abrogated by a writ of mandamus at the suit of plaintiff.

Defendant annexed to its answer the contract between itself

and the Western Union Telegraph Company. The district court rendered judgment, perpetuating the alternative writ of mandamus, and ordering a writ of mandamus to issue, commanding the Morgan's Louisiana and Texas Railroad Company to receive from the plaintiff, and to transport and deliver, the poles, wires, cross-arms, and materials offered to be shipped by the plaintiff for the purpose of building its telephone line along the line of said railway, from Boutte station to Morgan City, in the state of Louisiana, and to deliver the same in the swamps along the line of the said railway company between the said termini at points to be designated by the shipper.

The court, in its decree, recognized the power and right of the defendant company to regulate the time, order, and means of delivery, so as not to conflict or interfere with its regular business and passenger traffic, and to receive from the plaintiff the usual just and proper freight for the said service. It reserved the rights of the parties on this subject, declaring the same protected by the decree. Defendant appealed.

The contract referred to in the pleadings between the Southern ³⁵ Pacific Railway Company and the Western Union Telegraph Company, was entered into on the 3d of January, 1887.

It began with the recital that the Southern Pacific Company leased and operated certain railroads and property of other railroads, which were described, among them the defendant company, that the Western Union Telegraph Company had certain contracts with these companies, and it was desirable and to the interest of all parties to supersede, by a new agreement, all contracts then in existence, whereupon it was substantially agreed that the telegraph company should purchase all lines of poles then owned by the Southern Pacific Company, or by any of its branches, with all the instruments, et cetera.

The outstanding accounts between the parties were adjusted, and provision was made that thereafter the telegraph company should furnish all the necessary material to construct and reconstruct the line of wires between New Orleans and El Paso on its part, and that of the roads it leased or operated. The railroad company agreed to transport, free of charge, over the railroad covered by the agreement, upon application of the superintendent or other officer of the telegraph company, all persons in the employ of that company when traveling on business of the same, and also to transport and deliver free of charge along the line of said railroads all poles and other material and supplies

for the construction, operation, maintenance, repairs, and renewal and reconstruction of the lines and wires covered by the agreement, and of such additional wires and lines of poles and wires as might be constructed under the provisions of the agreement, and all material and supplies for the establishment, maintenance, and operation of the offices of both parties to the agreement, at places along and adjacent to said railroad, it being understood that all poles and other material and supplies for use of any said railroads should be transported free over any and all of the railroads covered by the agreement. The railroad company agreed to furnish all the labor to set the poles in the ground, and to erect the first wire and the insulators thereof, and thereafter to maintain and keep in order and repair the telegraph company's poles and wires, as well as those which might thereafter be erected. The parties agreed that a wire should be set apart for the use of the railroad company, and the remainder of the wires, without limit, should be used by the telegraph company for its general business. The contract provided for the free transmission of messages relating to the railroad and steamship business to any ³⁶ amount not exceeding twenty thousand dollars, for the mileage then existing, of seventeen hundred miles of railroad, and six dollars per annum for each additional mile leased or occupied afterward, and for anything in excess of twenty thousand dollars, the railroad company should pay the telegraph company half rates.

The telegraph company agreed to furnish the operators and the railroad the offices needed.

The sixth article of the contract was as follows: "6. The Southern Pacific Company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, and under the line, lands, and bridges of the railroads, covered by this agreement, and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires, and underground or other lines for commercial or public uses or business, with the right to put up or construct, or cause to be put up, or constructed, at the telegraph company's own proper cost or expense, from time to time, such additional wires and such additional lines of poles and wires, and underground or other lines, as the telegraph company may require; the lines to be located on the railroad right of way, such distance from the tracks, and in such manner on bridges, as the Southern Pacific Company may

designate; and the Southern Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth, and other obstructions to the construction and maintenance of the line and wires provided for herein, and the Southern Pacific Company will not, if it may lawfully refuse to do so, transport men or material for the construction, maintenance, or operation of a line of poles and wire, or wires, or underground or other lines in competition with the lines of the telegraph company, party hereto, except at and for the Southern Pacific Company's local rates, nor will it furnish for any competing lines, any facilities or assistance that it may lawfully withhold, nor, if it may lawfully decline to do so, stop its trains, nor distribute any material therefor at other than regular stations; provided, always, that in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use any proceeding in the name of the Southern Pacific Company or of any other companies for which it is acting hereunder, but shall indemnify and save it and them harmless from any and all damages, costs, charges, and legal expenses incurred therein or thereby."

Prior to the bringing of the present suit, a correspondence took ⁵⁷ place between A. W. Crandell, general superintendent of the plaintiff company, and A. C. Hutchinson, president of the defendant company, in reference to the subject matter which is involved in this litigation.

Under date of June 6th, Crandell telegraphed to Mr. Hutchinson, then in New York, to inform him of his conclusion in reference to the distribution of telephone poles. He said that his company did no telegraph business, that the Illinois Central, after first refusing on account of contract with Western Union, finally recognized that the proposed distribution did not conflict therewith. He asked him to arrange matters while in New York. Mr. Hutchinson telegraphed back he would await the return of his attorney, who was absent, before reaching a decision. On the 20th of June, he telegraphed Mr. Crandell, "he could not arrange as requested, too many complications likely to arise."

On the 23d of June, Mr. Crandell wrote to Mr. Hutchinson the following letter:

"Dear Sir: As you are aware from my conversation with you, this company is building a telephone line along the route of Morgan's Louisiana and Texas Railroad, but not on its right of way, between New Orleans and Texas, and cannot build that portion of the line between Boutte station and Morgan City,

unless the railroad company will render this company the same service it renders the telegraph company.

"We understand you refuse to do this because your contract with the Western Union Telegraph Company prohibits it, and are confirmed in that belief by your telegram of the 20th instant, as follows: 'Cannot arrange as you request. Too many complications likely to arise.'

"Fully impressed with the desire to live on good terms, and fully appreciating that public corporations should not quarrel and seek the courts if it can be avoided, we have submitted to the refusal, and incurred the extra expense of wagon distribution, wherever we could distribute by wagon. We are now, however, confronted with the situation that we cannot distribute in the swamps between Boutte station and Morgan City, unless your railroad company will extend the customary facilities; we must, therefore, either abandon the line, or insist upon the performance of this duty.

"It is with deep regret, therefore, that we announce to you that we must insist upon an early distribution of poles, and, if your company ^{as} persist in its refusal, will be compelled to lay the matter of this unjust discrimination before the United States district attorney, as we are advised that your refusal is a direct violation of the interstate commerce law. We will also proceed by mandamus. We beg to assure you that we have, as yet, made no complaint, and will make none, until the lapse of a reasonable time will allow you to answer."

To this letter, the following reply was received from Mr. Hutchinson:

"Dear Sir: I have your letter of the 23d inst., and, in reply thereto, I have to say that we shall be very glad to distribute your poles upon the line of the Morgan Road, and if we are at liberty to do so without violating the obligations imposed upon us by contracts made with the Western Union Telegraph Company, bearing date the 3d day of January, 1887, under which we agreed, among other things, that we would not furnish for any competing line any facilities or assistance that we might lawfully withhold, nor, if we might lawfully so to do, stop our trains, nor distribute material therefor at other than regular stations.

"I need not say that we should like to do this business for you and earn the compensation to be earned by doing it; that we are acting against our own immediate pecuniary interests in

declining to do it, but we have made a contract with the Western Union Telegraph Company, and we wish fairly and honorably to fulfill the obligations which we have assumed therewith. We do not wish to extend those obligations one whit beyond their fair and reasonable meaning, but, on the other hand, we do not wish to avoid any obligations which we have fairly assumed. If the court should hold that, notwithstanding this contract with the Western Union Telegraph Company, we are bound to distribute your poles upon receiving reasonable compensation therefor, we shall certainly be glad to earn the compensation to which we should be entitled for rendering the service, but we ought, perhaps, to correct an error in your letter in which you say that you cannot distribute your materials in the swamps between Boutte station and Morgan City unless the railroad company will extend some facilities to you in connection therewith. This must be a mistake on your part, as the Postal Telegraph Company has recently constructed a line between these points without our extending to them any facilities in connection therewith, and I know of no reason why you cannot do what the Postal Telegraph Company has done in that respect. At the ²⁰ same time, if it were in our power to do so, without disregarding obligations to our agreements with others, we should be glad to facilitate your distribution of material upon receiving reasonable compensation therefor, as you can very well understand."

On the 15th of July, 1898, replying to a letter of Mr. Crandell, which is not in the transcript, he wrote to him as follows:

"New York, 21st July, 1898.

"Dear Sir: I have received your favor of fifteenth, suggesting that you hope before the matter of distribution of poles is submitted to the courts, I might reconsider my decision on the subject. I am perfectly willing to reconsider the matter, but I don't see how I can change the views in reference to it which were expressed in my letter to you of the 27th ult. We should be very glad to do the business of distributing the poles at reasonable prices therefor, if we were at liberty to do so without violation of our contract with the Western Union Telegraph Company, which I referred to."

The question which meets us at the threshold is, whether the plaintiff is authorized to institute this action.

When a corporation undertakes to operate a railroad franchise,

it assumes all the duties and obligations which spring by law from the character of its business, and from the customs incidental to it. It tenders a continuing offer to the general public that it will perform these duties for the benefit of each and every one of them, when demanded at their hands.

When any member of the public makes a demand upon it under the general offer, there immediately results a civil obligation on the part of the company in favor of the parties, making the demand enforceable through the usual legal remedies by which contracts are enforced; were it not so, there would be a right without a remedy, for it could not be pretended that the state officers could be called upon to bring actions in the name of the state for the enforcement of the performance of duty by the company to all the private individuals with whom they have business relations.

It is said that these various parties have an action for damages ⁴⁰ against the company for nonperformance of duty, and that that is their remedy, and that they cannot proceed by mandamus to force the specific performance of the duty itself.

There is nothing in this claim. The party owing the duty cannot drive the other party to an action for damages, and by payment of money resist the performance of duty. What the plaintiff in this suit asks for and is entitled to, is the transportation of his freight, and not the payment of money to him. The latter would furnish no adequate remedy.

It is said that the mandamus cannot be granted, because the court would be called upon to make itself a contract between the parties, and this it is not authorized to do. The court is not called upon to make a contract between the parties, but to order the performance by the company of the duties as a carrier which it refuses absolutely to recognize as incumbent upon it, under any terms or conditions. The company is left free to charge for its services upon a quantum meruit.

While we have taken up these questions and disposed of them, it is very evident from the correspondence between the presidents of the two companies, from the pleadings in the answer, and from the stipulations in the contract annexed to the answer, that the service which the plaintiff demands at the hands of the defendant is one which the latter is able, willing, and anxious to perform, and that the only reason which stands in the way of its performance is the contract which it has made with the Western Union Telegraph Company.

We think it quite evident that the defense set up in this case, though made in the name of the Morgan's Louisiana and Texas Railroad Company, is one in reality made in that name by the Western Union Telegraph Company, under the stipulations in the contract made between it and Morgan's Railroad Company, and the real question is, whether the court will permit a railroad company to tie itself up in the discharge of its duties as a public carrier by a contract such as that shown by the record.

We think such a contract against public policy, in restraint of trade, and that it should not be permitted to stand in the way of the company's affording to the general public all the facilities it can consistently render, and is willing and able to render. We think such a contract should be brushed aside: ⁴¹ *Baltimore etc. Tel. Co. v. Western Union Tel. Co.*, 24 Fed. Rep. 319.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be and the same is hereby affirmed.

CARRIERS—DUTY TO CARRY—DISCRIMINATIONS.—A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all: Monographic note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 647.

CARRIERS—DUTIES—ENFORCEMENT OF BY MANDAMUS. Mandamus always lies against railroad companies to compel them to perform any clear legal duty imposed upon them by charter, statute, or the common law: Extended note to *Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 321; *Savannah etc. Canal Co. v. Shuman*, 91 Ga. 400, 44 Am. St. Rep. 43. Mandamus will not lie to compel a railroad company to receive freight for delivery beyond its line: *People v. Chicago etc. R. R. Co.*, 55 Ill. 95, 8 Am. Rep. 631.

CONTRACTS—RESTRAINT OF TRADE.—A contract by a railroad company granting to a telegraph company the exclusive use and occupancy of its right of way for telegraph purposes is void as in restraint of trade and as against public policy: *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781. See, as qualifying this doctrine, *Western Union Tel. Co. v. Chicago etc. R. R. Co.*, 86 Ill. 246, 29 Am. Rep. 28.

STATE v. ARDOIN.

[51 LOUISIANA ANNUAL, 169.]

CONSTITUTIONAL LAW—JURY TRIAL—EX POST FACTO LAWS.—A state constitutional provision dispensing with the unanimity of a jury of twelve, formerly required to convict of crime, and authorizing convictions on the concurrence of nine of the jury, is, as applied to offenses committed before such provision was adopted, an *ex post facto* law, and void.

STARE DECISIS.—The decisions of the supreme court of the United States are binding on the state courts when exactly the same question of a federal nature is involved.

E. B. Dubuissou and J. N. Ogden, for the appellant.

M. J. Cunningham, attorney general, R. L. Garland, district attorney, and E. P. Veazie, for the appellee.

170 MILLER, J. The accused, convicted of burning a vacant dwelling, punishable with imprisonment at hard labor, takes this appeal from the sentence.

He assigns as error patent on the record that the offense of which he was convicted was committed prior to the adoption of the present constitution, authorizing convictions on the concurrence of nine of the jury, that the constitutional provision in this respect, as applied to offenses before the constitution was adopted, is *ex post facto* legislation, and hence the sentence based on the verdict concurred in by nine only of the jury that tried him cannot stand. The argument is, that when the offense was committed there could be no conviction without the concurrence of the jury of twelve, and that the constitution of the state in dispensing with that unanimity, substituting the concurrence of nine only of the jury, violates the article of the constitution of the United States prohibiting *ex post facto* legislation by the state. If the change made by the constitution in respect to convictions for crime is to be deemed *ex post facto* in character when sought to be applied to the trial for offenses committed prior to the adoption of the constitution of the state, it is manifest the assignment must prevail: Rev. Stats., sec. 843, 976; Const., art. 116; U. S. Const., art. 1, S. 9, sec. 3.

The definitions of the *ex post facto* law, as it is often found in the text-books and decisions, that it is legislation constituting that a crime not an offense when the act was done, or that increases the punishment beyond that affixed to the act when committed, or that changes the rule of evidence by requiring a less degree of proof to acquit than necessary by the law when the

offense occurred, do not exclude other ¹⁷¹ illustrations of ex post facto laws: Cooley's Constitutional Limitations, c. 9, p. 33. In the recent exposition of the ex post facto law by the supreme court of the United States, the question was whether a conviction for crime obtained in Utah based on the verdict of eight jurors, that being the number provided by the constitution of that state, could be sustained in view of the fact that the offense was committed before the adoption of the constitution and while Utah was a territory. In defining the ex post facto law the court thus expressed itself: "The crime when committed was punishable by the territory of Utah, proceeding in all its legislation in subordination to the authority of the United States. The court below substituted as the basis of its sentence the verdict of eight jurors in place of the unanimous verdict of twelve, required to convict when the offense was committed. It cannot, therefore, be said that the constitution of Utah did not deprive the accused of a substantial right, and did not materially alter the situation of the accused to his disadvantage." In another part of the opinion the court gives the approved definition of the ex post facto law thus: "Any statute which, in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage," and the court held that the provision under discussion in the constitution of Utah was repugnant to the prohibition of ex post facto legislation: *Thompson v. Utah*, 170 U. S. 343.

The change made by the constitution of Utah was the provision of a jury of eight in courts of general jurisdiction except in capital cases, but required unanimity of the jury in rendering their verdict. Our constitution, in so far as it bears on this controversy, provides for a jury of twelve, in prosecutions for offenses necessarily punishable with imprisonment at hard labor, but authorizes the verdict by nine concurring jurors. In the Utah case the verdict was found by the eight composing the jury. In this case the verdict found is by eleven jurors. In each case the conviction is by less than what the supreme court of the United States terms the "historical" constitutional jury of twelve.

The distinction between legislative changes from time to time in methods of procedure and ex post facto laws is distinctly recognized in text-books and decisions: Cooley's Constitutional Limitations, c. 9, p. 264. On our first examination of this question we reached the conclusion that our recent constitution,

introducing the concurrence ¹⁷² of nine jurors to convict instead of the unanimous jury, kept within the limits of legislative control over legal procedure: *State v. Baker*, 50 La. Ann. 1247, 69 Am. St. Rep. 472; *State v. Caldwell*, 50 La. Ann. 670, 69 Am. St. Rep. 465. Our predecessors held a like view in *State v. Carter*, 33 La. Ann. 1214. When our decisions were made we were not aware of the recent decision of the supreme court of the United States.

We have had an elaborate argument on behalf of the state to maintain our own decisions, and in that connection it is urged that on the question presented the decisions of the supreme court of the United States are not binding on this court. We should certainly follow our own decisions, if that of the supreme court of the United States did not, in our view, exert controlling influence. The argument supposes a distinction between the question in this case and that determined in the Utah case. In that case the offense was committed when Utah was a territory, and the trial occurred after the territory became a state. The decision maintained that the provisions of the constitution of the United States guaranteeing the trial by jury applied to prosecutions for crime in the territories as well as in the states, and held that the trial thus secured was by the "historical" jury of twelve. The constitution of Utah, under which the accused was tried, in authorizing the conviction by a jury of eight, in the view of the court, deprived the accused of a substantial right, and hence was *ex post facto* legislation prohibited by the constitution: *Utah Const.*, art. 3, sec. 3, 6th amend.; *Thompson v. Utah*, 170 U. S. 344-350. The same course of reasoning applies with equal, if not greater, force in this case, in which both the offense and the trial occur in the state of Louisiana, subordinated in all its legislation to the provisions of constitution of the United States, guaranteeing the right of trial by jury construed in *Thompson v. Utah*, 170 U. S. 344, and, it may be added, subordinated to that other limitation on the legislative power, both state and federal, that no state shall pass any *ex post facto* law: *U. S. Const.*, arts. 1, 9, 10. It is the conclusion of the United States supreme court that the substitution of the jury of eight for the jury of twelve is *ex post facto*, and we cannot maintain the view of our own in this respect, different from the deliberate judgment of the highest tribunal with the jurisdiction to review and reverse the decision of this court, denying to the accused the right, in the view of that tribunal, secured to him by the consti-

tution of the United States. Any weight we ¹⁷³ might attach to stare decisis would avail nothing in a case presenting to the supreme court of the United States the denial of a right of the nature under discussion. That court would feel itself bound to enforce the protection of the federal constitution, and the decision in the Utah case gives us the interpretation of that tribunal: U. S. Rev. Stats., sec. 709. The argument supposes, too, that the provision in the Utah constitution construed in *Thompson v. Utah*, 170 U. S. 344, differs from that of our constitution under discussion. The difference is supposed to be in the fact that under the constitution of Utah a jury of eight only was provided, while our constitution provides for the jury of twelve, but authorizes the verdict by the concurrence of nine. It is claimed this gives the accused the chance of an acquittal by nine. This chance of acquittal, under the exposition of the supreme court of the United States, cannot be deemed to answer the requirement there can be no conviction at all, unless by the verdict of twelve, the only jury recognized in determining the question in this case. All the other aspects discussed in the trial and argument for the state had our attention. We think the decision of the supreme court of the United States makes it imperative to hold that article 116 of the constitution cannot be applied to offenses committed prior to the adoption of that instrument.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be reversed and set aside and the accused held for another trial according to the laws in force when the offense is charged to have been committed and to abide the result of that trial.

CONSTITUTIONS—JURY TRIAL.—EX POST FACTO LAW.—

A directly contrary decision to that in the principal case was rendered by the same court in *State v. Caldwell*, 50 La. Ann. 666, 69 Am. St. Rep. 465, where it was held that the change in the state constitution concerning the tribunal or method of procedure related to the remedy merely and was not an ex post facto law: See, also, *State v. Baker*, 50 La. Ann. 1247, 69 Am. St. Rep. 472, and note.

STARE DECISIS—In determining questions of federal cognizance, state courts ought to adopt and be governed by the rules of decision adjudicated in the supreme court of the United States: *Baxley v. Linah*, 16 Pa. St. 241, 55 Am. Dec. 494; *McFarland v. State Bank*, 4 Ark. 44, 87 Am. Dec. 701; *Linn v. State Bank*, 1 Scam. 87, 25 Am. Dec. 71.

COMPAGNIE FRANCOISE DE NAVIGATION A VAPEUR v. STATE BOARD OF HEALTH.

[51 LOUISIANA ANNUAL, 645.]

CONSTITUTIONAL LAW—QUARANTINE—REGULATIONS—TITLE OF ACT.—A statute, entitled "An act to carry into effect article 296 of the constitution of the state of Louisiana, in relation to boards of health, to protect and preserve the public health, to provide for the establishment and organization of a state board of health, to define its powers, and to authorize the regulation of contagious and infectious diseases," under which act the state board of health has authority to prohibit the introduction into an infected locality of persons coming from any place, whether such place or persons are infected or not, sufficiently expresses its object in its title, although the title also states that it is an act to authorize the regulation of a maritime and land quarantine against infected places.

BOARDS OF HEALTH—QUARANTINE REGULATIONS.—Under a statute entitled "An act to establish a state board of health, and to authorize the regulation of the isolation of infectious and contagious diseases," and conferring on such board general supervision for the control of such diseases to accomplish their subsidence and prevent their spread and also giving such board the right to regulate intercourse with infected places, and, in its discretion, to prohibit the introduction of any person into an infected locality, such board is authorized to prohibit the introduction into an infected locality of persons from a foreign country, whether such persons are immunes, or the place from which they come is infected with such diseases or not.

CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—POLICE POWER.—A statute authorizing a state board of health to prohibit the introduction of any person coming from a foreign country into any locality of the state infected with a contagious or infectious disease is a valid exercise of the state police power.

CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—INTERSTATE COMMERCE.—A statute authorizing a state board of health to prohibit the introduction of any person coming from a foreign country into any locality of the state infected with a contagious or infectious disease is valid, and does not violate the provision of the federal constitution giving Congress exclusive power to regulate commerce with foreign nations.

CONSTITUTIONAL LAW—QUARANTINE REGULATIONS. A statute authorizing a state board of health to prohibit the introduction of any person coming from a foreign country into any locality of the state infected with any contagious or infectious disease is valid, and does not violate the federal immigration laws, nor the treaties of the United States with foreign countries.

CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—DUE PROCESS OF LAW.—A statute authorizing a state board of health to prevent the landing by a vessel of its passengers and goods within a locality within the state infected by a contagious or infectious disease does not deprive the owners of the vessel of their liberty or property without due process of law, nor does it deny to them the equal protection of the laws.

BOARDS OF HEALTH—QUARANTINE REGULATIONS.—A state board of health is an agent of the state, and not liable for damages sustained by a vessel which has been lawfully prevented

by it from landing its goods and passengers within a locality in the state infected by a contagious or infectious disease.

BOARDS OF HEALTH—QUARANTINE REGULATIONS.—

Although a resolution of a state board of health that no persons shall be allowed to enter a locality infected with a contagious or infectious disease previously placed by it in quarantine, is intended especially to prevent a certain vessel from landing its passengers in such locality, this does not render such action illegal, nor make such board, nor members thereof, liable for damages resulting therefrom.

Howe, Spencer & Cocke, for the appellant.

F. C. Zacharie, for the appellees.

646 NICHOLLS, C. J. This case is before us on an appeal by the plaintiffs from a judgment of the civil district court, sustaining an exception of no cause of action, filed by the defendants, and dismissing their suit.

Plaintiffs' demand is set out in two petitions. In the first of these petitions they alleged that they were a corporation created by and existing under the laws of the republic of France, and the owner of a large number of steamships, and were engaged in the business of transportation of freight and passengers for hire from various ports on the Mediterranean sea to various ports in the United States, and more particularly to the port of New Orleans. That petitioners were more particularly the owners of the steamship "Britannia," which was engaged in the transportation of freight and passengers between the ports of Palermo and Messina, Italy, and the port of New Orleans, in the state of Louisiana.

That the defendant, the state board of health, was a body created by act No. 192 of the general assembly of the state of Louisiana, of 647 the year 1898, with power to sue and be sued, domiciled in this city and composed of seven members, whose duty it was, by the provisions of said act, to protect and preserve the public health by preparing and promulgating a sanitary code for the state of Louisiana, by providing for the general sanitation of the state, and with authority to regulate infectious and contagious diseases, and to prescribe a maritime and land quarantine against places infected with such diseases.

That the other defendants to their suit, to wit, Edmond Souchon, Hampden S. Lewis, and Charles A. Gaudet, were members of said board, and residents and citizens of the parish of Orleans.

That, in the course of petitioners' said business of transport-

ing freight and passengers from ports on the Mediterranean sea to ports in the United States, petitioners caused their steamship "Britannia," on or about the second day of September, 1898, to be cleared from the ports of Palermo, Italy, and Marseilles, France, for the port of New Orleans, with a cargo of about one hundred tons of general merchandise, and with about four hundred and eight passengers; said freight being destined for the port of New Orleans, state of Louisiana, and some of said passengers were persons designing and intending to enter the United States through the port of New Orleans for the purpose of settling in the state of Louisiana and adjoining states, and some were citizens of the United States and residents of the state of Louisiana, who were returning to their homes.

That said passengers were in all respects, at said time, and ever since, free from infectious or contagious diseases of any kind, and were free from any such diseases at the time of the arrival of said steamship at the quarantine station established by the defendant, the state board of health, some distance below the city of New Orleans, on the Mississippi river, about 8 o'clock A. M., on the twenty-ninth day of September, 1898. That on the same day, in accordance with the regulations of said defendant, the state board of health, said vessel was regularly inspected and her freight and passengers examined by the officers of the said board of health, and it was found that her passengers and cargo were entirely free from any infectious or contagious disease, or from any disease which was likely to affect the health of the people of New Orleans, or the state of Louisiana, and accordingly she was given a clean bill of health.

That notwithstanding this fact, and although under the rules and regulations of said defendant, the state board of health, said vessel ⁶⁴⁹ should have been permitted to at once proceed to her destination at the port of New Orleans, and there to discharge her cargo and passengers, and notwithstanding that her said cargo and passengers continued free of all infectious or contagious disease, or any disease likely to affect the health of the people of said city or state, and although said vessel had complied with all the regulations of said board, said state board of health, on the twenty-ninth day of September, 1898, at a session convened at its office in the city of New Orleans, whereat the following members were present, voting affirmatively and assenting to it, Edmond Souchon, Charles A. Gaudet, and Hampden S. Lewis, passed a resolution prohibiting, in effect, the said vessel from

coming into the port of New Orleans, and there discharging its passengers, certified copy of which resolution they annexed and made part of their petition. That, in pursuance of this resolution, Dr. Edmond Souchon, president of the state board of health, served a notice on the agents of petitioner (James Sawyers & Son) prohibiting the landing of said steamship at the port of New Orleans, and at the various other places mentioned therein, for the purpose of discharging said passengers, and, subsequently, the president of said state board of health notified the agents of petitioner that if they attempted to land said passengers at any place contiguous to the port of New Orleans, not at that time quarantined, that quarantine would at once be established at such place, and that said passengers would not be allowed to land there. That said prohibition virtually applied to all the territory within one hundred miles of the port of New Orleans, and in effect debarred said steamship from landing at any place in the state of Louisiana for the purpose of discharging said passengers, and petitioners annexed and made a part of their petition the notice as received from said state board of health.

They averred that while said resolution, on its face, purported to be general in its character, that as a matter of fact same was passed for the specific purpose of prohibiting and preventing said steamship "Britannia" from landing in the state of Louisiana, and discharging said passengers therein; inasmuch as for some time prior thereto, and even subsequent to the passage of said ordinance, said board of health had permitted large bodies of persons coming directly from the same ports in Italy and Sicily via the port of New York to be brought into the city of New Orleans by various railroad companies, and ever since the promulgation of said ordinance more than two ⁶⁴⁰ hundred such persons, varying in groups of from thirty to one hundred in number, had, from time to time, been permitted to enter said city.

That said state board of health pretended to base its right to thus exclude persons in good health and not affected with any contagious or infectious disease from the port of New Orleans and the neighboring territory upon the authority of said act No. 192 of 1898, and especially under the following portion of section 8 of said act, to wit: "The state board of health, in its discretion, may prohibit the introduction into any infected portion of the state of persons acclimated, unacclimated, or said to be

immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease."

That said portion of said section 8 of said act No. 192 of 1898 did not confer upon the state board of health the right to exclude healthy persons from coming from various foreign ports into the port of New Orleans, as pretended by them, and, if said section did so confer upon said board said pretended right and authority, same was in violation of the constitution of the United States, inasmuch as it was an attempt on the part of the state of Louisiana to regulate or prohibit commerce from foreign countries into the United States, or to authorize the regulation or prohibition thereof by said board, and was especially in contravention of article 1, paragraph 8, section 3, thereof, which provided that Congress shall have exclusive power to regulate commerce with foreign nations and among the several states; and petitioners specially pleaded and claimed the benefit and protection of said provision of the constitution.

Petitioner averred that this arbitrary and illegal action of the state board of health and the individual members thereof, by detaining said vessel at the quarantine station and preventing her from proceeding to the city of New Orleans and there discharging her passengers and cargo, had caused great damage, and was causing and would continue to cause petitioners further damage to an amount of more than five hundred dollars for every day that said vessel was prohibited from discharging said passengers, for the reason that, by law and by contract, petitioners were compelled to furnish said passengers with lodging and with food, and, besides, were subjected to a heavy expense in the way of wages for its crew and officers, and ^{also} various other and sundry expenses which they would not be compelled to suffer were they permitted to land said vessel and discharge its passengers and cargo as they had a right to do. That said arbitrary and illegal action of said board and the members thereof would cause petitioners to suffer heavy damages in the way of loss of business, for the reason that the agents of said steamship in the city of New Orleans had procured for and bound said ship to receive a large and complete cargo of freight destined for ports in Europe, for all of which damage the defendants were liable in solido to petitioners. That, by reason of said arbitrary and illegal action of said board and the members thereof, petitioners had already suffered damages from the cause aforesaid in the sum of two thousand five hun-

dred dollars, and they reserved their right to amend their petition and claim of said board and the members thereof in solido any further damage which they might suffer in the premises.

That unless said state board of health be restrained by the court it would persist in its illegal and arbitrary refusal to permit said steamer to land said passengers in the city of New Orleans, to the great and irreparable injury of petitioners, and petitioners averred that for the protection of their rights in the premises they were entitled to and desired a writ of injunction directed against the said board of health, its officers, and agents, prohibiting and enjoining them and each of them from interfering with or preventing the landing of said steamship at the port of New Orleans, and from unloading and discharging its passengers.

In view of the premises, petitioners prayed that said state board of health, its president, and said Edmond Souchon, Hampden S. Lewis, and Charles A. Gaudet, be cited; that a writ of injunction issue directed to said board of health, enjoining and prohibiting it and its officers, agents, and employés, and each of them, from enforcing said resolution or ordinance of said board, of date the 29th of September, 1898, or from prohibiting or interfering, in any manner, with petitioners bringing their said steamship "Britannia" to the port of New Orleans, and there discharging its passengers and cargo; that there be judgment in favor of petitioners and against said state board of health and Edmond Souchon, Hampden S. Lewis, and Charles A. Gaudet in solido in the full sum of two thousand five hundred dollars damages, with legal interest from judicial demand, and reserving unto petitioners the right to claim from said defendants any ^{and} further damages which they might thereafter be caused by their said illegal acts; that said portion of section 8 of said act No. 192 of 1898, set forth, be declared null and void, as being in contravention of the constitution of the United States, and that said writ of injunction be made perpetual.

In the second of these petitions they alleged that since the filing of the original petition they had suffered additional damages as thereafter set forth in a sum exceeding eight thousand five hundred dollars, for which, for the reasons set forth in their original petition and in said second petition, the defendants were liable to them in solido; that said damage was occasioned by reason of the illegal, unjust, and arbitrary action aforesaid of said state board of health, and said individual members thereof, in the exclusion from the city and port of New Orleans

of said vessel and passengers, some of whom were subjects of the king of Italy, entitled to the protection of the treaties between said sovereign and the United States, and who intended to avail themselves of the laws of the United States regulating immigration by entering the state of Louisiana to establish residence in said state or adjoining states. That said immigrants and other passengers were so excluded and prevented from landing, notwithstanding the fact that said steamer "Britannia" had complied with all the laws of the United States regulating commerce with foreign nations, quarantine, and immigration into the United States, and notwithstanding that said immigrants were coming from ports which were not infected with any contagious or infectious disease, and were not themselves infected with any such disease, but were, at the time of their departure, and at all times thereafter, free from any infectious or contagious disease, or diseases that were likely to affect the public health of the citizens of New Orleans, or state of Louisiana, and were, under the immigration laws, entitled to enter. That petitioners had no notice of the intended action of the defendant in so prohibiting the landing of said passengers and immigrants until the arrival of their steamer "Britannia" at the port of New Orleans, said steamer having sailed prior to the declaration by said board of the existence of an infectious disease in the city of New Orleans.

That by reason of the illegal and arbitrary conduct of the defendants, petitioners were compelled for many days to keep said vessel moored in the river below the city of New Orleans, with all of its said passengers, crew, and cargo aboard. That as said defendants persisted ^{and} in their said illegal and arbitrary refusal to permit the landing of said immigrants and passengers, in order to minimize as much as possible its damages, petitioners were compelled to send their said steamer to the port of Pensacola, Florida, which was the nearest available port to the port of New Orleans, and there disembark said immigrants and passengers, and thereafter to cause their said steamer to return to the port of New Orleans to discharge its cargo. That said voyage to and from Pensacola, from and to New Orleans, so occasioned, caused a loss of time to said vessel, even with the utmost dispatch, of more than three weeks. That during the illegal detention of said vessel in the Mississippi river, and during the voyage to Pensacola, and while in said port, petitioners were at great expense in the maintenance and care of said immigrants, passengers, and crew of said vessel. Moreover, petitioners suf-

ferred great damages, as would be shown on the trial of the case, in the way of extra wages of officers and crew, extra fuel and supplies consumed on said voyage between New Orleans and Pensacola, as well as during the said illegal detention, extra compensation to its agents in this city of New Orleans and at Pensacola, cablegrams, and other expenses. Furthermore, petitioners had suffered large damages by reason of the fact that said vessel thus lost more than twenty-one days on the voyage from her home port and return, which delay occasioned petitioners a large loss both of business and profits, and the damages thus occasioned to petitioners by said illegal and arbitrary action of said defendant exceeded in the aggregate the sum of eleven thousand dollars, and said damages were caused solely by said illegal and arbitrary action of said board, and not otherwise. That said action of said defendants in prohibiting the entrance and landing of said passengers and immigrants in the port of New Orleans and the state of Louisiana was, moreover, in violation of the laws of the United States and the rules and regulations made in pursuance thereof relating to quarantine at and immigration from foreign countries into ports of the United States, and especially acts of Congress approved February 15, 1893, and the rules and regulations made in pursuance thereof, and acts of Congress of March 3, 1882, and June 26, 1884, and the rules and regulations made in pursuance thereof, and of the treaties existing between the United States, on the one part, and the kingdom of Italy and the republic of France, on the other part, and petitioners specially pleaded and claimed the benefit of said acts and treaties.

653 The premises considered, petitioners prayed that defendants be cited; that there be judgment in favor of petitioners and against the said defendants as in their original petition prayed for, and, further, that there be judgment in favor of petitioners and against the defendants in solido in the full sum of eleven thousand dollars, with legal interest from judicial demand.

Annexed by plaintiffs to their petition was a copy of the resolution of the board of health, and of the notice served upon plaintiffs, which they had referred to in their pleadings. The notice reads as follows:

“Louisiana State Board of Health.

“September 29th, 1898.

“Messrs. Jas. Sawyers & Son, Agent S. S. ‘Brittannia,’ New Orleans, La.

"Gentlemen: Referring to the detention of the S. S. 'Britannia' at the Miss. River Quarantine Station, with 408 Italian immigrants on board, I have to inform you that under the provisions of the new state board of health law, section 8, of which I inclose a marked copy, this board has adopted a resolution forbidding the landing of any body of people in any town, city, or parish in quarantine. Under this resolution the immigrants now on board the 'Britannia' cannot be landed in any of the following parishes of Louisiana, namely, Orleans, St. Bernard, Jefferson (right bank), St. Tammany, Plaquemines, St. Charles, or St. John. You will therefore govern yourself accordingly.

"Respectfully,

(Signed) "EDMOND SOUCHON, M. D.

"President Louisiana State Board of Health."

The resolution read as follows:

"Resolved, that hereafter, in the case of any town, city, or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers, or others, shall be allowed to enter said town, city, or parish, so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

At the time of the adoption of the constitution of 1898, there existed in the state of Louisiana a state board of health, with powers and duties defined and fixed by law.

Article 296 of that constitution directed that the general assembly ³⁵⁴ should create for the state, and for each parish and municipality therein, boards of health, and should define their duties and prescribe the powers thereof.

On the 14th of July, 1898, the governor of the state approved act No. 192, enacted by the general assembly at the session of 1898. The act was entitled, "An act to carry into effect article 296 of the constitution of the state of Louisiana, in relation to boards of health; to protect and preserve the public health; to provide for the establishment and organization of a state board of health and parish and municipal boards of health; to define the powers, duty, and authority of said boards; to provide for the appointment and election of officers, and employes of said board; to authorize the state board to prepare and promulgate a sanitary code for the state of Louisiana, and fixing penalties for the violation thereof; to provide for the general sanitation of the state, and a local sanitation of the parishes and municipalities; to authorize the regulation of the isolation of cases of in-

fectious and contagious diseases, and a maritime and land quarantine against places infected with such disease; to repeal all laws and parts of laws, special and general, in conflict with the provisions of this act; and to provide for the succession of the boards created by this act to all powers, authority, rights, claims, and property of the present boards."

By the second section of the act the duties and powers of the president, and secretary, and treasurer of the state board were declared to be those incident to like officers in similar corporations, and also such other powers and duties as then devolved by law upon their predecessors in the existing board, as well as those additionally prescribed by the provisions of the act. In addition to said powers and duties already prescribed by existing laws, the president was granted the power after the adjournment of the board, and during the interval of time between the meetings of the board, and when the board was not in session, to issue all orders and warrants and to take all necessary steps to execute the sanitary laws of the state and to carry out the rules, ordinances, and regulations of the board made therein, and, in his discretion, to call special meetings of the board, whenever, in his opinion, an emergency should require it.

By the third section, the board was granted all the powers, authority, and jurisdiction then possessed by the existing board of ^{the} health under the laws then in force, except in so far as modified and changed by the provisions of the new law. It was given exclusive jurisdiction, control, and authority over maritime quarantine within the state, as then provided by existing laws. It was also given supervisory power over land quarantine and over the care and control of infectious and contagious diseases within the state, in order to accomplish the subsidence and suppression thereof, and to prevent the spread of the same; such supervision and control was directed to be exercised in the manner and to the extent laid down in the act.

By the eighth section it was enacted that, in case any parish, town, or city, should become infected with any contagious or infectious disease to such an extent as to threaten the spread of such disease to other portions of the state, the state board of health was directed to issue its proclamation declaring the facts and ordering it in quarantine, and to order the local boards of health in other parishes, towns, and cities to quarantine against said locality, and it was further directed to establish and promulgate the rules and regulations, terms, and conditions on

which intercourse with said infected locality should be permitted.

The state board of health was authorized, at its discretion, to prohibit the introduction into any infected portions of the state of persons, acclimated, unacclimated, or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease.

Plaintiffs contend that the state board of health requires that the court should read in the eighth section of act No. 192 of 1898 a grant of authority to prohibit the introduction into the state of healthy persons coming from places not infected with infectious or contagious diseases.

In their brief they say: "If this was the intention of the legislature, why did it express its objects to be 'to authorize a maritime and land quarantine' against places 'infected' with contagious or infectious diseases? If an authority was intended to be given to establish maritime quarantine against any place whatsoever, without reference to the existence of disease there, the legislature would certainly not have qualified the noun 'places' by the adjective 'infected.'"

"It is clear that the effect of that adjective is to qualify and make ^{ess} special what was before general; to limit the number, and, as it were, to put a badge upon the places against which maritime quarantine can be declared, and hence to put a restriction upon the power of the board.

"If the existence of disease at some place, or in relation to some individual, was not a condition upon the board's power to quarantine, it inevitably follows that the act contains something supremely important, not expressed in its title, namely, a power to quarantine against any place and exclude from the state any people whatsoever, totally irrespective of the existence of infectious or contagious disease, in relation to such person or place.

"We submit that the court will not adopt a course of reasoning which leads to this result. It must presume that the legislature intended to obey article 31 of the constitution and to sanction no object in the act not expressed in the title. A fortiori will the court indulge the presumption when it finds that the title of the act declares the intention of conferring a limited and defined, as opposed to a general, power, as the legislature was bound by the constitutional mandate to do; that the measure of the power granted in relation to maritime quar-

antine is declared by the act to be fixed by existing laws in force, which laws are conceded by the contention of the defendants in this case to confer only a limited power, and plaintiff urges that, if the statute of 1898 did authorize the state board of health to exclude from this state healthy persons coming from other states or from foreign countries, it was not a lawful exercise of the legislative power by the state of Louisiana.

"That the statute, on its face, and as applied, is void for the reason that it is in violation of article 1, section 8, of the constitution of the United States, because it vests authority in the state board of health, in its discretion, to interfere with or prohibit foreign commerce; because it deprives the plaintiff of its liberty and property without due process of law and denies it the equal protection of the law in violation of section 1 of the fourteenth article of amendment of the constitution of the United States; because it denies rights, privileges, and immunities secured to subjects of the king of Italy, and to the citizens of the republic of France by treaties between the United States and said countries, in that it vests the board of health with power to deny the right of free ⁶⁵⁷ visitation and trade to Italian subjects and French citizens, as granted by said treaties; because it is in conflict with the immigration laws of the United States, made in pursuance of the constitution of the United States."

We would not render act No. 192 of 1898 unconstitutional as violative of article 31 of the constitution of 1896, which declares that "every law enacted by the general assembly shall embrace but one object, and that shall be expressed by its title," by holding that that act conferred authority upon the state board of health to prohibit the introduction into any infected portion of the state of persons acclimated, unacclimated, or said to be immune, coming on shipboard from foreign countries and ports, whether infected or not, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease.

Were we to hold that the act conferred such power, the granting of the power in the body of the act could be very legitimately referred to several different clauses of the title. It would be very properly covered either by its declared object of "carrying into effect article 296 of the constitution of the state in relation to boards of health, providing for the establishment and organization of a state board of health, and of defining the power, duty, and authority of said board"; or its object "of pro-

tecting and preserving the public health," or "of authorizing the regulation of the isolation of infectious and contagious diseases."

We have ourselves recently held, in the case of Allopathic State Board etc. v. Fowler, 50 La. Ann. 1358, that it is a sufficient compliance with the constitutional requirements of the title if the title indicates the general purposes of the law without specifying in detail each particular provision of the law: See on this subject 23 Am. & Eng. Ency. of Law, 229 et seq.; Cooley's Constitutional Limitations, 173; State v. Crowley, 33 La. Ann. 783; State v. Dalon, 35 La. Ann. 1141; American Printing House v. Dupuy, 37 La. Ann. 188.

Appellants urge upon us that the general assembly did not intend by and through act No. 192 of 1898 to confer upon the state board of health the power which it exercised, of preventing them from landing the "Britannia" and its passengers, as stated in their petition, nor did it do so.

⁶⁵⁸ We do not think this proposition well founded; there is nothing in the terms of the statute which would justify us in giving to it the narrow construction for which plaintiffs contend. The fact that the title contains a clause to authorize a "maritime and land quarantine against places infected with infectious and contagious diseases," is not inconsistent with, nor does it control or circumscribe the broad and general terms of other clauses. Appellee properly claims that it in no wise affects the "power," "duty," and "authority" of the board to prevent the spread of the disease when once introduced by quarantining against persons coming into an infected district.

The act, in its title, authorizes the state board to regulate the isolation of cases of infectious and contagious diseases, leaving it to adopt the method to be pursued for bringing about this isolation. In its body it confers, in very broad terms, a supervisory power over the care and control of infectious diseases within the state "in order to accomplish the subsidence and suppression thereof and to prevent the spread of the same."

That no doubt could exist as to the scope of the power, it conferred upon the board "the right to regulate the terms and conditions on which intercourse with infected localities should be permitted," and in clear, unambiguous language authorized it, at its discretion, to prohibit the introduction into any infected portion of the state of persons acclimated, unacclimated, or said to be immune, when, in its judgment, the introduction

of such persons would add to or increase the prevalence of the disease.

The law does not limit the board to prohibiting the introduction of persons from one portion of the state to another and an infected portion of the state, but, evidently, looked as well to the prohibition of the introduction of persons from points outside of the state into any infected portion of the state. As the object in view would be "to accomplish the subsidence and suppression of the infectious and contagious diseases, and to prevent the spread of the same," it would be difficult to see why parties from outside of the state should be permitted to enter into infected places, while those from the different parishes should be prevented from holding intercourse with each other.

The object in view was to keep down as far as possible the number of persons to be brought within danger of contagion or infection, and ^{and} by means of this reduction to accomplish the subsidence and suppression of the disease and the spread of the same.

The particular places from which the parties who were to be prohibited from entering the infected district or districts came could have no possible influence upon the attainment of the result sought to be attained. It would make no possible difference whether this "added fuel," sought to be excluded, should come from Louisiana, New York, or Europe.

We see nothing in the particular place in the act in which this power is conferred to cause us to suppose that the legislature intended to place upon it the limitations which appellants contend for. They claim that the powers of the present board were those of its predecessor, but this is obviously not the case. The new board was given, by the third section of the act, the powers of the old, but with such modifications as would be operated under the provisions of the article of 1898. It is very clear that the general assembly intended to grant additional powers to the board, and this very power was, beyond question, one of them.

During the fall of 1897, and during the existence of an epidemic, a vessel arrived in the Mississippi river with immigrants aboard, under conditions similar to those under which the "Britannia" reached the same stream in 1898.

The excited public discussions at the time as to the right of the state board, under the then existing law, to prevent the landing of the immigrants, and as to its duty in the premises, were so extended as to authorize us to take judicial notice of the fact, and, in our opinion, the clause in the present act which

covers that precise matter was inserted therein for the express purpose of placing the particular question outside of the range of controversy.

For a number of years past immigrants have been coming into New Orleans, in the autumn, from Italy. There was a probability, when the general assembly met, in 1898, that the epidemic of 1897 might be repeated, and a great probability that immigrants would seek to enter as they had done the year before, to the great danger, not only of the people of Louisiana, but of the immigrants themselves.

Independently of this, there was great danger to be apprehended ⁸⁸⁰ from the increasing intercourse between New Orleans and the West India Islands, in consequence of a war with Spain. It was to ward off these dangers that this particular provision was inserted in the act of 1898.

Appellants maintain that the act of the general assembly is violative of the constitution of the United States, and in contravention of its treaties with France and Italy, and its immigration laws. We are not of that opinion. It is the right and duty of the different states to protect and preserve the public health. This right is not held by the states by permission of the federal government, nor is its legitimate and proper exercise controlled by that government simply by reason of the existence of a power in the latter "to regulate commerce."

As a matter of course, state legislation which would cross the boundary line which separates the state's police power of protecting the public health to really interfere with and invade the right and power of the general government to regulate commerce would be set aside, but it is not every restriction upon commercial operations, remotely and incidentally brought about by the passage of state health laws, which can properly be designated as such interference or invasion.

In *In re Rahrer*, 140 U. S. 554, the supreme court of the United States, speaking through Chief Justice Fuller, made use of the following language: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation legitimately for police purposes as not in the sense of the constitution infringing upon any right which has

been confided expressly or by implication to the general government. The fourteenth amendment, in forbidding a state to make or to enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person the equal protection ^{of} the laws, did not invest, nor attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation. It is not to be doubted that the power to make ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that, in this respect, it is not interfered with by the fourteenth amendment."

In *Gibbons v. Ogden*, 9 Wheat. 203, Chief Justice Marshall, referring to state inspection laws, said that "they were certainly recognized in the constitution as being passed in the exercise of a power remaining with the states. That inspection laws might have a remote and considerable influence upon commerce could not be denied, but that a power to regulate commerce could not be admitted as the source from which the right to pass them was derived. That they formed a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which could be most advantageously exercised by the states themselves. That inspection laws, health laws of every description, as well as laws for regulating the internal commerce of a state and those which respect turnpike roads, ferries, et cetera, were component parts of this mass. That no direct general power over those objects was granted to Congress, and, consequently, they remained subject to state legislation."

The general assembly of this state, in enacting act No. 192 of 1898, was not acting or claiming to act under "a power to regulate commerce," as the source from which it derived the right to pass the act. Its source was the police power of the state, exercised for the protection and preservation of the public health.

No one who reads the act, or who knows and appreciates the circumstances under which it was enacted, can for a moment doubt the perfect sincerity of the general assembly in dealing with this matter. It was futile to say that there was any other purpose in view than that which appears on the face of the act. There could exist no other possible motive than that announced. None other can be plausibly suggested.

662 We not only think the legislature acted in absolute good faith, and under no disguise, but are of the opinion that the legislation was timely and judicious, well calculated to assist "in accomplishing the subsidence and suppression of infectious and contagious diseases and preventing the spreading of the same," and we are further of the opinion that the action of the state board was legally taken, under the provisions of the act, and not arbitrary and unjustifiable, as claimed.

The conclusions we have reached as to the provisions of act No. 192 not being unconstitutional as infringing upon the right and power of Congress to regulate commerce carries with it, as a result, the holding by this court that the act was not in contravention of the treaties of the United States with France or Italy, or of the immigration laws of the general government, or of any rights secured by the fourteenth amendment of the constitution of the United States.

The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power by the different states, in aid of the protection and preservation of the public health within their respective borders.

We scarcely think it could be pretended that an act of the general assembly of Louisiana, under the provisions of which a shipload of citizens of the state of New York could be legally prevented from being landed in the city of New Orleans, during an epidemic, could, by reason of a treaty, be held, as against foreigners coming to our shores, to be inoperative, null, and void. They could have no broader rights than our own citizens in this matter, and should be subjected to the same restrictions and inconveniences which they are, when these are demanded at their hands for the preservation and protection of the public health.

The claim of the plaintiffs that they have been deprived in the premises of their liberty and property, without due process of law, is utterly untenable. They have not been deprived of liberty nor of property, but simply prevented from doing an act which, if permitted to be done, would not only be to the great injury and damage of the people of Louisiana, but, in all likelihood, to the great damage and injury of the passengers upon their ship. We do not see "what process of law," beyond that taken, could have been taken by the health authorities. 663 It is very unfortunate that plaintiffs' ship and her passengers should have been detained as they were, but if loss has been suffered it is *damnum absque injuria*.

The defendant board is not an ordinary corporation; it is a "body politic," with corporate powers, with the right to sue and be sued. It is a governmental public agency, representing the state in respect to the matters with which it stands intrusted. Were this court to find plaintiffs entitled to a judgment, it would not be an ordinary judgment, susceptible of execution by fieri facias. The judgment would be, substantially, one against the state, and of the character of those referred to in article 192 of the present constitution.

Plaintiffs charge that the resolution adopted by the board of health, though general in terms, was in reality directed specially against them. The arrival of plaintiffs' ship under the circumstances then existing may have given rise to the resolution as evidencing a necessity for action under the power conferred on the board by the act of 1898, but the fact that it was the first ship to which the resolution was made to apply would not justify the charge that it was specially aimed, in an offensive sense, at the plaintiffs. The resolution is general, and there is no reason to suppose that it would not have been executed against any other ship or ships which might fall under its terms. Be that as it may, if the board had the legal power and right to act as it did, the motive with which it may have been done is not a matter for our consideration. Our conclusions absolve, necessarily, the members of the board from legal liability for their course.

For the reasons assigned, it is ordered and decreed that the judgment appealed from be and the same is hereby affirmed.

STATUTES—TITLE OF ACT.—The title of an act, whether of original legislation or amendatory thereof, must fairly express the subject of legislation: *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492; see the monographic note to *Bobel v. People*, 64 Am. St. Rep. 70, where the question is fully treated.

QUARANTINE LEGISLATION—BOARD OF HEALTH.—A state board of health may, by the legislature, be authorized to establish a quarantine system for the purpose of preventing immigrants and other persons from entering the state and going from place to place within it who, in the opinion of the board, or an inspector appointed by it, are likely to carry infectious diseases, and generally to establish quarantine regulations and rules and detain and disinfect baggage and other property: *Hurst v. Warner*, 102 Mich. 233, 47 Am. St. Rep. 525, and monographic note thereto. See, also, *Potts v. Breen*, 167 Ill. 67, 59 Am. St. Rep. 262.

QUARANTINE REGULATIONS—POLICE POWER.—Quarantine laws are a familiar exercise of the police power of a state: Monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 536.

QUARANTINE REGULATION—INTERSTATE COMMERCE.—A state quarantine law is not necessarily invalid because it may affect commerce with foreign nations or among the states. It must

not, however, unnecessarily interfere with such commerce, and it cannot, under pretense of adopting quarantine regulations or health laws, regulate or prohibit commerce in any way, or to an extent not required for the preservation or promotion of the public health: Monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 538-538.

BOARDS OF HEALTH—QUARANTINE REGULATIONS—DAMAGES.—Health officers acting within the limits of their authority are not liable for the consequences of a mistake of judgment when proceeding in good faith and with reasonable caution: Monographic note to *Hurst v. Williams*, 47 Am. St. Rep. 548. A city is not liable for injuries to a quarantined vessel due to the negligence of health officers, where they have unlawfully taken possession of the vessel: *Mitchell v. Rockland*, 41 Me. 363, 66 Am. Dec. 252.

STATE v. NEWMAN.

[61 LOUISIANA ANNUAL, 523.]

CORPORATIONS—SUCCESSOR—POWERS.—One corporation, as the successor of another corporation, can exercise only such powers as are conferred by legislative grant, either in express terms or by necessary implication, upon the latter corporation.

CORPORATIONS.—IMPLIED POWERS in corporations are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted and to accomplish the purpose of their creation.

CORPORATIONS.—AN INCIDENTAL CORPORATE POWER is one directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it.

CORPORATIONS—RIGHT TO ACQUIRE STOCK—IMPERFECT OWNERSHIP.—Although, under some circumstances, one corporation may lawfully acquire holdings of stock in another, such holdings do not partake of the fullness of perfect ownership, but constitute an imperfect ownership, only giving the right of enjoyment and disposition of the property when that can be done without injuring the rights of others.

CORPORATIONS—RIGHT TO ACQUIRE AND VOTE STOCK.—Under circumstances tolerating it, one corporation, not possessing the express or necessarily implied power to acquire stock in another, may do so and collect dividends thereon and dispose of it, and yet it does not have the power to vote the stock at elections for officials to govern and manage the affairs of the other corporation.

CORPORATIONS—ENGAGING IN BUSINESS NOT AUTHORIZED BY CHARTER—CONTROLLING ANOTHER CORPORATION.—If one corporation takes possession of and manages the affairs of another, it thereby engages in a business other than that authorized by its charter, and such transaction is opposed to public policy and void.

Buck, Walshe & Buck, F. N. Butler, and F. N. Butler, Jr.,
for the appellants.

E. H. McCaleb and Fenner, Henderson & Fenner, for the appellees.

⁸³⁴ BLANCHARD, J. An election for directors of the Jefferson City Gaslight Company was held November 7, 1898. The board of directors of that corporation is composed of five persons, elected annually by the stockholders. The election is by ballot, and is conducted or presided over by three inspectors or commissioners of election chosen for the purpose. There were two tickets in the field for directors, one headed by James Jackson, the other by Isidore Newman, Sr. The Newman ticket was returned elected by the inspectors. Whereupon James Jackson and those running on the ticket with him instituted this proceeding by quo warranto to inquire into said ⁸³⁵ election and to contest the authority by which Newman and his associates, returned elected, claim the office of directors aforesaid.

Jefferson City was once an independent municipality. Later it became merged into the city of New Orleans and now forms part of the latter city. When it was an independent municipality, the Jefferson City Gas Light Company was organized, first by notarial charter, afterward by legislative enactment confirming the grants made to the company by the mayor and council of Jefferson City. The time of the expiration of this charter is a subject of contention—relators claiming it expires March 9, 1899; respondents that it expires April 15, 1900. But this is not a direct issue in the present controversy, and it is, therefore, not necessary to pass upon it.

The New Orleans Gas Light Company and another corporation known as the Crescent City Gas Light Company were organized under legislative charters. The former was granted the exclusive privilege of making and vending gas in the city of New Orleans from the date of its incorporation in 1833, until April 1, 1875, and the latter was granted the same privilege for fifty years from the date of expiration of the charter of the first named company.

In 1870, when the legislative charter of the Crescent City Gas Light Company was granted, the city of Jefferson had not yet become a part of the municipality of New Orleans. When, later, it and other suburban towns were merged into the city of New Orleans, an act was passed by the general assembly of the state, amending the charter of the Crescent City Company, by which it was declared that the "city of New Orleans," as used in the original charter, should be deemed "to include all parts of

the present city of New Orleans, and any additions which may at any time be made thereto," but that it was not the intention of the act to conflict with the existing charter of the Jefferson City Gas Light Company. In other words, while the franchise privilege of the Crescent City Gas Light Company was extended to cover that portion of the city of New Orleans formerly known as Jefferson City, such privilege was not to attach until the charter rights of the Jefferson City Gas Light Company had expired, or some action was otherwise taken in respect thereto by the two corporations satisfactory to both, fulfilling the injunction of the law ⁸³⁶ to avoid a conflict with the rights claimed by the Jefferson City Gas Light Company under its charter.

In 1875, just prior to the expiration of the charter of the old New Orleans Gas Light Company, that corporation and the Crescent City Gas Light Company, under authority of law, effected a consolidation by which the two companies, with all their rights, privileges, property, et cetera, became merged into one, thereafter to be known as the New Orleans Gas Light Company.

In 1882 this company purchased, and has since held, fifteen hundred and six out of the three thousand shares representing the capital stock of the Jefferson City Gas Light Company. This was a majority of the stock of the latter company. Of the fifteen hundred and six shares so purchased, fourteen hundred and ninety-one shares have been and are carried on the books of the Jefferson City Gas Light Company in the name of the New Orleans Gas Light Company, ten shares in the name of A. H. Seward, and five in the name of R. M. O'Brien. Seward and O'Brien have been for years past and are now president and vice-president, respectively, of the New Orleans Gas Light Company.

It appears that the right of the New Orleans Gas Light Company to hold and to vote the stock of the Jefferson City Gas Light Company, purchased by it as aforesaid, has not heretofore been challenged. Accordingly, this stock has been voted at recurring elections for directors in the Jefferson City Gas Light Company, and Seward and O'Brien, with James Jackson, F. C. Lorenzin, and W. A. Lorenzin, have been repeatedly chosen as the board of directors of said company, and were the incumbent board at the time the election took place over which the present controversy arose. So that, as holders of the majority of stock in the Jefferson City Gas Light Company, the New Orleans Gas Light Company has exercised a controlling voice and influence in the affairs and in the management of the former company.

When, however, the election for directors in November last came on, certain of the minority stockholders filed with the officials named to conduct the election a protest against permitting the New Orleans Gas Light Company to vote the stock held by it, and demanded that the inspectors refuse and reject the vote when tendered. The ground of the protest was that the New Orleans Gas Light Company is without legal right or standing to vote the stock held by it, or to exercise any act of ownership in respect thereof.

Sieward, president of the New Orleans Gas Light Company, appeared and tendered ⁸³⁷ the vote of the fourteen hundred and ninety-one shares of stock held by his company. It was offered to be cast for relators herein. The inspectors, acting on the protest referred to, declined to receive it. Had this vote been received and accounted, it would have elected relators directors of the Jefferson City Gas Light Company for the ensuing term. Without it, the result of the election, as tabulated and returned by the inspectors, showed the election of Newman and others, respondents herein. The president of the New Orleans Gas Light Company duly protested against the action of the inspectors in declining to receive the vote he tendered.

If the New Orleans Gas Light Company had the legal right to vote its stock, then must the vote tendered by its president be considered as cast, and relators held entitled to be recognized as the board of directors of the Jefferson City Gas Light Company. If it did not have the legal right to vote its said stock, then must this proceeding by quo warranto fall, with the resultant effect, impliedly, of recognizing respondents as the true and lawful board of the Jefferson City Company.

Whatever authority the present New Orleans Gas Light Company possesses, in respect of its rights to acquire and hold personal and real property, is derived from the charter granted by the state to the Crescent City Gas Light Company, of which, as we have seen, it is the assignee and successor. It may exercise only such powers as were conferred by the legislative grant upon the Crescent City Gas Light Company, either in express terms or by necessary implication. Implied powers in corporations are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted, and to accomplish the purpose of their creation. And an incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it:

People v. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319.

But, in the view we take of the case, it is not necessary to pass directly on the question whether or not the New Orleans Gas Light Company could legally acquire, and may lawfully hold, stock in the Jefferson City Gas Light Company.

Conceding that under some circumstances one corporation may not unlawfully acquire holdings of stock in another corporation, such ⁸³⁸ holdings, we think, do not partake of the fullness of perfect ownership as defined by the Civil Code, article 491, giving "the right to use, to enjoy and to dispose of . . . in the most unlimited manner." They rather come under the head of what the code, article 492, describes as "imperfect ownership," which only gives the right of enjoying and disposing of property when it can be done without injuring the rights of others.

For instance, when, under circumstances tolerating it, a corporation, not possessing the express or necessarily implied power to do so, acquires stock in another corporation, it may collect dividends on the same and may at will dispose of it, and yet not have the power to vote the stock at elections for officials to govern and manage the affairs of the other corporation. This is sustained by both reason and authority and founded in the public policy of the state.

If a corporation, like the New Orleans Gas Light Company, formed to manufacture and sell gas within certain limits of the city of New Orleans, is permitted to acquire a controlling interest in the stock of another gas company authorized to make and sell gas in another part of the city, and by such controlling interest to practically take possession and manage the affairs of such other corporation, it, in effect, is equivalent to engaging in a business other than that authorized in its charter, and this is in direct violation of the fundamental law: Const. 1879, art. 237; Const. 1898, art. 265. The public policy of a state is manifested by its fundamental law, or by legislation enacted in pursuance thereof, and that it is the duty of the judiciary to refuse to sustain that which is against public policy is beyond cavil.

In *Milbank v. New York etc. R. R. Co.*, 64 How. Pr. 20, it was held by the supreme court of New York that though a railroad corporation may take title to all kinds of personal property, including stock of other railroad corporations, to secure debts due it, the investment by a railroad company of its

corporate funds in the purchase of the stock of another corporation is not necessary in the exercise of any of its corporate powers, is unauthorized, in violation of the statute, and consequently ultra vires. Further, that while a railroad corporation remains the owner of the stock of another corporation it may collect and receive dividends thereon, ⁸³⁹ and has the right to sell and dispose of the same, it has no right to vote thereon. To the same effect is the ruling of the supreme court of Alabama in *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 631, 16 Am. St. Rep. 81. See, also, *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah etc. R. R. Co.*, 43 Ga. 13; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319.

The conclusion reached is that the New Orleans Gas Light Company could not legally vote the shares of stock in the Jefferson City Gas Light Company owned and held by it, either in its own name or in the names of other persons, at the election held for directors on the seventh day of November last, and, not having such legal right, it is without just cause of complaint that its vote was not received and counted. Had it been received and counted, and a different result as to the choice of directors had, the minority stockholders, protesting against its vote, would have had a legal cause of action in the courts to contest the same, and avoid the election thereby brought about. And so the final result would be the same.

We have given consideration to the contention of relators that because the New Orleans Gas Light Company has been permitted to vote the stock held by it in past years, the other stockholders of the Jefferson City Gas Light Company are estopped from now denying its right to vote. But we cannot give our assent to this doctrine as thus broadly insisted on.

It is public policy, crystalized into law, which denies it the right to vote, and what is against the law cannot, in such a case as this, be legalized by acquiescence. Estoppels are not favored. Besides, there may have been no particular reason in the past for the minority stockholders to object to the vote, whereas, at the recent election, when the expiration of the charter of the Jefferson City Gas Light Company drew near and a liquidation of its affairs perhaps necessary, there may have been the best of reasons for objecting to the New Orleans Gas Light Company electing a board of directors of its own choosing, especially so in view of the fact that it claims the right of succession to make and vend gas in that part of the city, and was

likely to become a bidder for the property and effects of the outgoing company.

That conflicts of interest, in view of this, between the companies are likely to arise is not difficult to foresee, and to contend that a board of directors chosen by the succeeding company, especially that part of the board invested with important holdings and powers of administration in the superseding corporation, will be altogether impartial ⁸⁴⁰ and unbiased in respect to the matters and things over which the clash of interest arises, or may arise, is to expect a little too much of average human nature. So the law wisely removes the temptation.

Because, after the expiration of the charter of the Jefferson City Gas Light Company, the New Orleans Gas Light Company claims the right, under the act of the legislature, to make and vend gas in that part of the city of New Orleans, that fact cannot be held to vest the latter company with authority not theretofore possessed with regard to acquiring and voting the stock of the former corporation and thus controlling its affairs.

Nor do we think that the question of the right of these two gas companies to consolidate, and, as incidental to that right, the question of the authority of the one to acquire the stock of the other with which it is proposed to consolidate, arise in this case. There is no pretense that any such purpose was in view.

The judgment of the court below was in favor of respondents and the same is affirmed.

Mr. Justice Breaux concurs in the decree.

CORPORATIONS—IMPLIED POWERS.—A business corporation has implied power to do that which is reasonably necessary to the business, or that which is usually incident to its prosecution, but this is the limit of its implied power: *Northside Ry. Co. v. Worthington*, 88 Tex. 562 58 Am. St. Rep. 778; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 500, 63 Am. St. Rep. 302.

CORPORATIONS—AN INCIDENTAL POWER is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it: *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 834.

CORPORATIONS—RIGHT TO ACQUIRE STOCK—CONTROLLING ANOTHER CORPORATION.—In every instance in which the purchase or ownership by one corporation of stock in another has been justified or upheld, it will be found, we think, that the decision of the court has been placed upon the ground that the facts of the case were such that the action of the corporation could not be said to be outside of what it might properly do as an incident of the pursuit of a power expressly granted to it. Furthermore, as the holding of stock by one corporation in another naturally tends to create, or, at least, to aid and encourage, monopolies, it is not

sustainable under any circumstances when it appears that the acquisition of such stock was for the purpose of obtaining the control of another corporation and thereby enabling a single corporation to possess and exercise the franchises and control the business operations of two or more corporations: Monographic note to Denny Hotel Co. v. Schram, 36 Am. St. Rep. 134-142, treating the entire question; note to Farmers' etc. Trust Co. v. New York etc. Ry. Co., 55 Am. St. Rep. 704; Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 1, 42 Am. St. Rep. 17.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY v. BOARD OF ASSESSORS.

[51 LOUISIANA ANNUAL, 1928.]

TAXES IMPOSED ON A NONRESIDENT whose property is not within the state are void.

TAXATION—SITUS OF DEBT.—Debts due to a nonresident, and not reduced to concrete form, have their situs at the domicile of the creditor, and not at the domicile of the debtor, for the purposes of taxation.

F. C. Zacharie and J. J. McLoughlin, assistant city attorney, for the appellants.

Saunders & Miller and E. W. Huntington, for the appellee.

1028 BREAU, J. Plaintiff brought this suit to have the assessment of its "credits" canceled, for the year 1897. Plaintiff was assessed for money loaned on interest, all "credits" and 1020 all bills receivable for money loaned or advanced, or for goods sold, and all "credits" of any description. We understand that the issues now relate to the assessment of "debts" that were due for premiums, and that the other items of property assessed do not give rise to any question for our decision. The plaintiff corporation has no domicile in this state. But it has a resident board of directors, a resident secretary, and an assistant secretary; the latter is secretary of the board, but not of the company. They are an advisory board to the home board. The resident secretary, it appears, manages the business and renders his accounts, and makes remittances to plaintiff. The company complied with the requirements of act 245 of 1897, by opening an office in this state for the purposes stated in the article of the code.

The position of plaintiff is, that credits due the company for uncollected premiums are only taxable at the domicile of the company. This is controverted by the defendants, who urge,

in substance, that the plaintiff's "credits" fall within the grasp of the revenue law adopted in 1890, taxing the property of non-residents.

The whole theory of taxation under the constitution of 1879, which governs in this case, was based on the idea that the taxes were a property tax, and that the property assessed should be seized and sold to satisfy the taxes for which it was assessed. The old method of recovering taxes by suit against the debtor was abolished, and in its place the constitution ordained that the property assessed should be seized and sold for the taxes. No great difficulty should now arise in assessing and collecting the taxes on every item of property stated in the revenue act as subject to taxation.

Now, as to debts, a mere debt, a promise to pay, has no value within the limits of the state, if it be due to one not domiciled in the state. Its value is at the domicile of the creditor, where it has its situs. It is not property, save at the domicile of the creditor. If assessed and sold for taxes, we are inclined to think that the title would be greatly wanting in essentials to a perfect legal title.

If treated and considered as a license tax for carrying on business, ¹⁰³⁰ collection may be effected, perhaps, but that would only prove that the proposition is correct, for a license tax is not a property tax.

The opinion from which we will quote in a moment is broader in its scope than needful to sustain our view. The fact in that case is, an attempt was made to tax foreign creditors. The court decided against it, and held that the debts owed by individuals are not property of the debtor in any sense; that they are promises, obligations, duty, and only possess value in the hands of the creditors where they are property, and in whose hands they may be taxed. "To call debts property of the debtors is a misuser of terms."

"Debts have no situs separate from the domicile of the creditor. This principle might be supported by citations from numerous adjudications, but authorities could not add to the manifest truth": Justice Fields, organ of the court, in *Railroad Co. v. Pennsylvania*, 15 Wall. 300.

This question of taxing "credits" was considered by Mr. Cooley. He, in language not ambiguous, gives it as his opinion that debts owing to foreign creditors by individuals are not taxable at the domicile of the debtor: *Cooley on Taxation*, 15.

Upon the same subject we extract from the book of another

commentator: "A debt not evidenced by negotiable paper, according to our view, may be taxed at the residence of the debtor; according to another view, at the residence of the creditor. The weight of authority sustains the latter view": Burroughs on Taxation, 41. "The situs of the debt is the creditor's domicile": Wharton on Conflict of Laws, sec. 80. "Debts have no other situs than the residence of their owners": Desty on Taxation, 326.

The decisions of this court have repeatedly held that "credits" have their situs at the domicile of the creditor, as will be seen by the following extracts: "The tax collector affirms the validity of the tax on the ground that the section of act 98 of 1896 directs that movable property shall be assessed in the parish where it is located. This applies to tangible movables, but not to incorporated rights generally, which follow the person of the owner and are not susceptible of physical location." It is well settled that the situs of a debt as property is at the domicile of the creditor: Citing *Murray v. Charleston*, 96 U. S. 432; ¹⁰³¹ *Railroad Co. v. Pennsylvania*, 15 Wall. 300; *Cooley on Taxation*."

Justice Fenner was the organ of the court in the case from which we have just quoted: *Meyer v. Sheriff etc.*, 41 La. Ann. 646. It is well to bear in mind that, under the revenue law of 1886-90, "debt" was included as property subject to taxation. This decision was rendered in June. In December of the same year, Justice Poche, as the organ of the court, said: "In the case of *Meyer v. Sheriff etc.*, 41 La. Ann. 645, hereinabove referred to, it was held in harmony with settled jurisprudence that the situs of a debt is at the domicile of the creditor." Also: "And on that subject it is, beyond question, the rights of a corporation, as well as of a neutral person, to have a legal domicile, and that domicile is in the state where it was incorporated. . . . With the leave of other states, a corporation can extend its operations to other states, but it does not, thereby, acquire a new domicile in every state in which it does business. . . . It retains the domicile of birth, and, like neutral persons, it is at that domicile that its obligations for, and its liability to, taxation for debts or other incorporeal rights which it owns, must be tested and settled": Citing *Railroad Co. v. Koontz*, 104 U. S. 11; *Yuba County v. Pioneer etc. Co.*, 32 Fed. Rep. 183.

Again, the court in that case, in substance, says that the corporation was a foreign one and continued as a foreign corpo-

ration without any change in its status growing out of its compliance with article 236 of the code.

The question came up again in 1892. Justice Fenner, whose opinion is entitled to great weight, particularly in view of the fact that he had considered the question in *Meyer v. Sheriff etc.*, 41 La. Ann. 645, was the organ of the court, and said: "There is no doubt of the legislative power to modify the rule of comity *mobilia personam sequuntur* in many respects. Movables having an actual situs in the state may be taxed there, though the owner be domiciled elsewhere. Even debts may assume such concrete form in the evidences thereof that they may be assessed when such evidences are situated in the state, as in the case of bank notes, bills of exchange, or bond. But as to mere ordinary debts, reduced to no such concrete forms, they are not capable of acquiring any situs distinct from the domicile of the creditor, and no legislative power exists to change that situs, so ¹⁰⁸² far as nonresident creditors are concerned. As said by the supreme court of the United States: 'To call debts property of the debtors is simply to misuse terms.' All the property there can be, in the nature of things, in debts, belongs to the creditors to whom they are payable, and follows their domicile wherever they may be. The debts can have no locality separate from the parties to whom they are due": *Railey v. Board of Assessors*, 44 La. Ann. 769.

In the case of *Clason v. New Orleans*, 46 La. Ann. 1, this court said: "Under the principles enunciated in those cases, the fact that the plaintiff has a resident clerk acting for it in the city of New Orleans, and that it has an office and pays a license there, is unimportant. For the purpose of a determination of the issue involved herein, we have to deal with the plaintiffs as nonresidents, and, in so dealing with them, we are of the opinion that the judgment of the lower court is correct." The court in this case held, substantially, that the credit owing to a foreign firm is not subject to taxation.

In *State v. Board of Assessors*, 47 La. Ann. 1545, the court held: "But it has never been decided that tangible personal property could not be assessed at the owner's domicile, notwithstanding its actual situs was abroad, in some other state or country"—a proposition not before us at this time. If it were, it would meet with our entire approval. There is no question here of the situs of personal property which has a visible existence as stated in the case from which we have quoted.

This was not a case involving a "mere, ordinary debt," as

subject to taxation. The other cases decided by this court, subsequent in date, made no question of the right to assess tangible movables.

The court said in one of the cases: "The defendants cite the case of *Clason v. New Orleans*, 46 La. Ann. 1, to sustain their contention. The decision in *Liverpool etc. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, is of more direct application. The decision gave full recognition to the exemption from taxation here of debts due the foreign corporations, but maintained the assessment on the cash of the company necessary here for its business purposes."

The principle of the decision in *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, applies to this case. We cannot hold that cash thus liable to taxation is exempted. ¹⁰³³ There is no question in the case before us for decision of cash, which is undeniably a tangible, movable subject of taxation.

The defense urges that the doctrine *mobilia sequuntur personam* is subject to so many exceptions that it can be applied only in the simplest cases—a proposition to which we have not the least objection to offer. It is unquestionably true. None the less, it does not apply in the following case. Let us suppose that a person domiciled in England binds himself to insure an owner of property who has a domicile in this state, on condition that the owner pays him an amount fixed within a stipulated time; the promise of the assured to pay for this insurance would not be subject to taxation in this state. For the same reason, the assured's promise to pay in the case now before us for decision is not subject to taxation here.

The defense also urges that the decisions (*Meyer v. Sheriff etc.*, 41 La. Ann. 646, and *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015) do not sustain subsequent decisions, because, under the tax acts of 1886 and 1888, there were no provisions in conflict with the doctrine *mobilia sequuntur personam*.

In a former law, i. e., law of 1886, all "credits" were subject to taxation due by any "person, company, association, or corporation in and out of this state," and all "credits" held, controlled, or administered by "agents" and others in this state. Section 1 of the act, as in the act of 1890.

The revenue law enacted in 1888 is substantially the same, and was not less broad than the act of 1890. In the law requiring "debts" owed by the foreigners to be assessed for taxation, as we take it, it was intended for all such debts as are evidenced

by note or by mortgage, or that are in such other concrete form as to render it possible to subject them to taxation under the present laws. No attempt has been made since the cited decisions were rendered to localize the "debts," "open accounts," such as those upon which the taxes are now claimed.

The state of Louisiana possesses jurisdiction for purposes of taxation under present laws over bonds owned by corporations actively engaged in business within the state, without regard to the owner's demands, also judgments; such bonds and judgments being in themselves property which may have a situs away from the owner's domicile.

1034 As to "open accounts" with a foreign company, for such protection as it may offer, the law to date has not localized them so as to render it possible to assess them here and sell them for taxes.

While it may be that a domicile in the state as to those accounts may well be required as a condition precedent to a foreign company's business in the state, they cannot, in our view, be assessed here as foreign "credits" under the working of the present law.

We have reviewed the decisions of the supreme court of the United States, of date comparatively recent, which the defense contends show a change in the jurisprudence since the decision rendered in *Railroad Co. v. Pennsylvania*, 15 Wall. 300, before cited.

We found in the first case reviewed that the company sought to be taxed was a corporation created by the commonwealth of Kentucky for the purpose of erecting a railroad bridge with its approaches over the Ohio river, between the city of Henderson, in Kentucky, and the Indiana shore. The court held "that the tax controversy was nothing more than a tax on tangible property of the company in Kentucky, consisting of tax franchise."

The company was a Kentucky company, and, under the revenue law of the state, tax is levied on the home company, i. e., "on all property of corporations organized under the laws of the state," whether such property be in or out of the state, including the intangible property of such corporations, which property, that is, the intangible property, whether situated in or out of the state, shall be considered and estimated in fixing the value of the corporate franchise, as we understand all property tangible or intangible of home companies. This decision sustains our view. The franchise and other intangible prop-

erty, it holds, is subject to taxation at the domicile of the owner, where it is situs: *Henderson Co. v. Kentucky*, 166 U. S. 150.

Another case of the same court, from which the defense quotes, was an Ohio case. It purports to provide for a tax upon property within the state of Ohio, and a mode of assessment to ascertain the value of the property in Ohio, and not to assess intangible property, having its situs in another state: *Adams Express Co. v. Ohio*, 165 U. S. 228.

We take it that the supreme court of the United States in *Home Silver Min. Co. v. New York*, 143 U. S. 315, was concerned with ¹⁰³⁵ the question of a franchise, and found, under the law of New York, that the company was bound for the tax upon its franchise property, which the courts have repeatedly held has a situs within the limits of the state by which it was granted.

We find no error in the judgment; it is affirmed.

Nicholls, C. J., absent.

TAXATION OF THE PROPERTY OF NONRESIDENTS: See the monographic notes to *Buck v. Miller*, 62 Am. St. Rep. 473; *New Albany v. Meekin*, 56 Am. Dec. 523-537.

TAXATION—SITUS OF DEBT.—The situs of a debt for purposes of taxation, and usually for all purposes, is with the creditor: *Balk v. Harris*, 124 N. C. 467, 70 Am. St. Rep. 606.

STUDEBAKER BROTHERS MANUFACTURING COMPANY v. ENDOM.

[51 LOUISIANA ANNUAL, 1263.]

CONTRACTS—NOVATION.—The plea of novation of contract admits the debt sued on and casts upon the opposition the burden of proving the state of facts necessary to show its extinguishment.

CONTRACTS.—NOVATION OF CONTRACT IS NEVER PRESUMED, and the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt. A mere modification will not do, and anything remaining of the original obligation prevents novation.

CONTRACTS—NOVATION.—To constitute the contract of novation, in the essential point of the extinguishment of the original obligation, there must be shown the consent of both of the contracting parties, and the mere intention of the obligor that the pre-existing debt shall be discharged does not suffice. The creditor must concur in this.

E. T. Lamkin and W. F. Millsaps, for the appellants.

A. A. Gunby, for the appellee.

¹²⁰⁴ BLANCHARD, J. This case was before the court in June of last year, on appeal by defendants from a judgment favorable to plaintiffs. Considering the trial court had erred in sustaining an objection raised by plaintiffs to a question asked Fred. Endom, a witness called to testify for defendants, the judgment was reversed and the case remanded in order that the testimony of the said Endom might be taken. See *Studebaker Bros. Mfg. Co. v. Endom*, 50 La. Ann. 674, where the necessary facts for a proper understanding of the controversy are stated. The case is again before us on appeal by defendants from an adverse decree entered up against them as the result of the second trial.

The community existing between Fred. Endom and his wife owed plaintiffs two thousand six hundred and eighty-seven dollars and seventy-eight cents on account. On July 1, 1893, three promissory notes of Endom, as head master of the community, were given for the debt. Shortly afterward the wife died. Endom qualified as natural tutor for the minor heirs of the wife. The wife's succession, as such, was not opened and there has been no administration of the same as a succession.

When the first of the three notes, given as above, matured, it was not paid. Mrs. Endom was then dead. Not being able to meet the matured note, it was agreed between plaintiff and Endom that the three outstanding notes (one due, two ¹²⁰⁵ not yet due) should be taken up by four notes representing the principal and interest of the first three notes. Accordingly, on February 6, 1894, the four new notes were executed, replacing the old notes, and the latter were surrendered to Endom, who was alike the signer of both sets of notes.

The day following, Endom, to secure the four new notes, executed a special mortgage in favor of plaintiffs on certain real property belonging to the community. By its terms the mortgage covered the whole of the property. Subsequently, plaintiffs brought suit on the notes and asked recognition of mortgage on Endom's interest in the property mortgaged. Judgment followed against Endom for the amount of the notes and recognizing and ordering enforced the mortgage on his interest in the property. Neither the heirs of the wife, nor her succession, were made parties to the suit. It would seem that plaintiffs have not been able to realize the amount due them on this judgment against Endom and his interest in the community property mortgaged.

Therefore it is that the present action is brought. Its object

is to subject to the payment of the debt the share of the community property claimed by the wife's heirs under benefit of inventory. The major heirs are made parties defendant and Fred. Endom, as tutor, is cited on behalf of the minor heirs. The petition recites the facts and circumstances leading down to institution of the suit. The defense is "extinguishment by novation of the antecedent community obligation and the consequent release of the wife's interest in the community property and discharge of her heirs."

Plaintiffs having offered the deposition of two witnesses to prove the allegations of their petition, defendants objected to the testimony on the ground that plaintiffs had declared on certain notes, and parol evidence was not admissible to prove the existence and contents of the notes in view of the fact that there was no allegation of their loss or destruction, and on the further ground that, having declared on notes, evidence was not admissible to establish an indebtedness on an open account. This objection was properly overruled. Plaintiffs' action cannot ¹²⁰⁶ be regarded specifically as a suit on the original notes, nor yet on the account of indebtedness preceding them. Their petition is a recital of the facts, from which, if true, results the liability of the wife's share of the community property for the debt, unless the special defense of novation set up by defendants is established.

The sole question, then, at issue is whether the indebtedness due plaintiffs for carriages and vehicles sold to Endom prior to the death of his wife was novated after her death by the taking of new notes from Endom in lieu of those executed during the lifetime of the wife. The plea of novation admits the debt sued for and throws upon defendants the burden of proving the state of facts necessary to show its extinguishment: *Gails v. Schooner Osceola*, 14 La. Ann. 54.

Novation is never presumed; the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt: Civ. Code, sec. 2190; *Helme v. Middleton*, 14 La. Ann. 489. It is a contract consisting of two stipulations, one to extinguish an existing obligation, the other to substitute a new one in its place; and the pre-existent obligation must be extinguished, or there is no novation. A mere modification of it will not do; anything remaining of the original obligation prevents novation: Civ. Code, secs. 2185, 2187. Applying these rules of the law to the facts of the case at bar, our conclusion is the plea of novation cannot be sustained.

Endom, whose testimony was taken on the second trial, declares, it is true, that the old indebtedness was absorbed by the new notes and mortgage, and that he considered the old notes canceled. He gets this idea from the fact that, when the new notes were substituted for the old, the latter were surrendered to him. He states further that it was his intention, by the execution of the four last notes and the mortgage, to entirely extinguish the former debt evidenced by the three notes first given.

"His intention" alone does not suffice. The intention, too, of the other party must appear. To constitute the contract of novation, in the essential point of the extinguishment of the pre-existing obligation, there must be shown the consent of both contracting parties.

Here, one of the stipulations of the contract of novation alone appears, viz., that new notes were substituted for the old. As to the ¹²⁰⁷ other stipulations, to wit, an agreement to extinguish the then existing obligation, it is not established.

On the contrary, plaintiffs' agent, who dealt with Endom at the time, testifies there was no intention whatever to release the estate of Mrs. Endom or to novate the debt; that there was no agreement to that effect; that the subject was not discussed between himself and Endom; that the latter, being unable to pay the notes at the time, simply proposed to renew them to a certain date and offered to mortgage some property to secure the deferred payments. This was acceded to. Mrs. Endom's name, or her death as affecting the liability of the whole community property for the debt, was not mentioned at all.

This evidence is corroborated by that of another of plaintiffs' employes, who was chief accountant for the company, and, as such, had control of the settlement of all its outstanding claims. It was he who sent the agent who dealt directly with Endom and gave him the instructions as to the settlement to be made, et cetera.

The case is identical, or very nearly so, with that of *Rusk v. Warren*, 25 La. Ann. 314, and controlled by it. See, also, *Baker v. Frellsen*, 32 La. Ann. 822; *Latiolais v. Citizens' Bank*, 33 La. Ann. 1444; *Bergeron v. Patin*, 34 La. Ann. 534; *Levy v. Ford*, 41 La. Ann. 880; *State v. Board of Assessors*, 48 La. Ann. 1156.

Judgment affirmed.

CONTRACTS—NOVATION.—Novation is a transaction whereby a debtor is discharged from liability to his original creditor by con-

tracting a new obligation in favor of a new creditor by order of the original creditor: *Griggs v. Day*, 136 N. Y. 152, 32 Am. St. Rep. 704. To entitle the creditor to recover against the substituted debtor, it must appear that the creditor assented to the arrangement, and that the original debt was extinguished: *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *Bonnemer v. Negrete*, 16 La. 474, 35 Am. Dec. 217.

SAPP v. FRAZIER.

[51 LOUISIANA ANNUAL, 1712.]

ALLUVION IS LAND FORMED BY SEDIMENTARY DEPOSITS and added to an ordinary tract by the imperceptible action of waters bordering on the latter. It is a mode of acquiring property by natural law.

DERELICTION OR RELICTION IS LAND ADDED TO A FRONT TRACT by the permanent uncovering of the waters, the laying bare of the bottom by the retirement of the waters, as contradistinguished from the building up of the bottom by deposits, causing the waters to recede.

DERELICTION—WHAT NOT SUFFICIENT TO CONSTITUTE.—The temporary subsidence of waters occasioned by the seasons, coming in winter, staying through spring, going in summer, and gone through the autumn, does not constitute dereliction in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. Where water periodically rises over land and then recedes, there is no reliction.

ALLUVION—RELICTION—WHAT NOT SUFFICIENT TO CONSTITUTE.—A riparian owner who has title to a tract of land bordering on a lake, the title to which, as well as the bed thereof, is in the public, can claim title to no part of the bed of the lake by accretion or reliction, if the original bed of such lake has undergone no change and there has been no deposit forming alluvion, nor any permanent subsidence of the waters thereof uncovering land to become dereliction.

DERELICTION—WHAT NOT SUFFICIENT TO CONSTITUTE.—If parts of the bed of a lake are temporarily uncovered by the recurring flow of the waters and again covered by their annual rise and flow, there can be no dereliction.

PUBLIC LANDS—BED OF LAKE—RIGHTS IN.—A lake and its bed, the title to which is in the state, are free to all to enter upon or any part thereof for any purpose not unlawful, and no one may claim any privilege there superior to others. No priority of right to any particular spot or place in such lake bed can be held by any one against the entry by others, for grass cutting or other lawful purposes.

Stewart & Stewart, for the appellant.

L. K. Watkins, for the appellees.

1710 **BLANCHARD, J.** Plaintiff, in 1896, acquired by purchase certain tracts of land fronting on Lake Bistineau, aggre-

gating about two hundred and twenty acres. The authors of his title had acquired the land from the United States. It is "hill" land, or "uplands." When, many years ago, the government surveyors ran the lines of the townships and sectionized the lands of that region of country, the tracts of land in question formed fractional sections, or parts of fractional sections. What necessitated these fractional sections was the existence of the lake and its omission from the survey. The front, or eastern and northeastern, side of these fractional sections was a meander line running around the west bank of the lake. Between the meander line and the other, or straight, lines of the fractional sections, the government computed so many acres and disposed of the land according to such computation.

Lake Bistineau is a body of water situated in Northwestern Louisiana, forming a boundary line between the parish of Bienville on the east and the parish of Bossier on the west, and extending up into the parish of Webster. The lake is thirty or forty miles long and from a mile to two miles wide. At its northern extremity Bayou Dorcheat flows into it, and through Loggy bayou at its southern extremity the lake drains into Red river.

The three (Loggy bayou, Lake Bistineau and Bayou Dorcheat) constitute a navigable waterway of the United States, to improve which Congress has repeatedly made appropriations of money, and through which steamboats approach within a few miles of the town of Minden, the county seat of Webster parish.

Navigation through the lake for steamboats begins in January or February, and extends through the spring months into the early summer. The lake bed is covered with water for from six to seven months in the year, and for five or six months, beginning in the summer and extending through the autumn season, the greater part of its bed is ¹⁷²⁰ uncovered, the waters receding and draining off into Red river.

During the season when the water is down, what is called "the low-water channel," having the appearance of a small bayou, meanders through the bed of the lake. Through this drains the surplus water remaining in the lake and that which comes into it from the summer and fall rains. Sometimes the water in this channel runs—there is a current—and sometimes there is none.

The bed of the lake has never been looked upon as private property. Those living on it and near it, and, indeed, the public generally, have regarded it as pertaining either to the

United States or the state of Louisiana. All were thought to have an equal right upon the lake bed or bottom when its waters were down, as they had upon the lake itself when its waters were up. Accordingly, during the Civil War people came long distances to the lake, to utilize the water, rising in shallow wells dug in its bed, for salt making purposes, and the salt wells of Lake Bistineau became famous and were the chief source of the supply of salt for a large area of country. So, too, the cattle of all living within convenient distance have had the indiscriminate range of the lake and were driven to its bed, when the waters were down, for pasturage purposes. And hunters, far and near, resorted in numbers to the lake in the fall and winter months to enjoy the sport of shooting the innumerable wild fowl that congregate there.

About twelve or fifteen years ago a new kind of grass began to grow upon the lake bed immediately following the annual subsidence of its waters. This grass grows to a height of two or more feet, and so thick that it chokes out and destroys the cocklebur and other weeds and grasses where it appears. It is an excellent forage grass, cattle graze and fatten upon it, and it was soon discovered that hay made from it was better than the best the market afforded.

The result was, that the people of that section of country began going upon the bed of the lake at the season when the grass was in condition, and cutting and baling the hay, both for their own use and for market.

At the point where the land which plaintiff's titles call for borders the lake, the latter is nearly two miles wide and there this grass, so much in demand, seems to grow to the best advantage. Hence, it was and is a favorite locality of the grass cutters, and before plaintiff ¹⁷²¹ acquired his holdings defendants and other persons were in the habit of cutting much hay there. Indeed, plaintiff seems to have been lured to that particular locality of the lake by the advantages mentioned, and his investment in the uplands, bordering the lake there, induced by the same. He believed that, by acquiring the lands fronting on the lake, he would take as riparian proprietor to the center of the lake bed, or to the low-water channel. He seems to have been the first to assert a right of this kind. Having purchased and taken possession, he announced his purpose to claim the right of ownership and of dominion to and over the lake bed in front of his holdings.

Defendants, Frazier and Noles, who lived near by and who had been cutting grass there for several years, were preparing to

do so again in the summer following the purchase of plaintiff. They were on the ground with baling press, mowers, et cetera, had cleared away the bushes, erected a small cabin for shelter, and had cut some hay. Plaintiff appeared, claimed the ground and the grass, forbade further cutting by defendants, caused one of them to be arrested for trespass, and then brought the present action to restrain them by writ of injunction from going upon that part of the lake bed, or cutting grass there.

In his petition he claims the ownership as riparian proprietor, by right of accretion or accession, of all the lake bed to the low-water channel in front of his land situated on the hills bordering the lake, and his prayer is that he be decreed the owner thereof and the injunction be perpetuated.

Defendants deny that plaintiff has any right of ownership or possession in and to the lake lands in front of his tract bordering the lake. They allege the lake, its bottom or bed, to be public property; that the same has never been surveyed and is not subject to private ownership. They assert that neither in the past, nor since plaintiff purchased land on the lake front, has there been any alluvion or batture formed there, nor has any dereliction occurred by which any of the lake bottom has become uncovered, in the sense of the law, and attached to his holdings. They deny that he is the riparian owner of lands on the lake, and aver that his title calls for a "limited field" and so many acres fixed, the boundary thereof extending on the lake side no further than the natural bank of the lake at ordinary high water, ending at the meander line of the lake. They further contend that if ¹⁷²³ any part of the lake bed in front of plaintiff's land is alluvion or reliction, the same had formed years ago, long prior to plaintiff's acquisition, and the same never passed to plaintiff because in no manner expressed or included in his deeds. They reconvene for damages for his unlawful act in driving them from the land and restraining them by injunction, and represent that, after service of the injunction upon them, he (plaintiff) himself cut the grass on the land where defendants had prepared to cut it, and marketed the same, or a portion thereof.

On these issues the case went to trial before a jury, whose verdict was favorable to defendants, but without any award as to damages against plaintiff. The judgment of the court, based on this verdict, recites the rejection of plaintiff's demand, as well as that of defendants for damages. Plaintiff appeals, and defendants ask amendment of the judgment by awarding them the sum they claim for damages.

The first inquiry arising is, Do plaintiff's titles, by their terms, embrace and include the land in the lake bed where defendants were cutting hay? They do not. There is no pretense that they do.

The next inquiry is, Has there been formed in front of his land bordering the lake other land either by accretion or dereliction, in the sense of the law, and susceptible of ownership, and, if so, when did it form, and, if formed prior to his purchase, did his vendors include the same in the sale to him? If the lake bed in front of his land comes neither under the denomination of accretion nor dereliction, then it would seem that plaintiff has no right to fence defendants off such lake by either injunction, or rail or wire.

In the view we take of the case, it is not necessary to decide whether or not plaintiff has riparian rights as owner of the lands bordering the lake, nor whether or not the doctrine of "limited fields"—in *agris limitatis* of the Roman law—applies to the titles by which he holds. Neither is it necessary, or advisable, for us to inquire into the rights, if any, in and to the bed of the lake appertaining to the United States, or state of Louisiana—whether such bed does or does not attach to the public domain of the one or the other, whether or not the same is or is not susceptible of disposition under existing law by the one or the other through their respective land departments, ¹⁷²⁸ or whether or not Congress, in the one case, or the general assembly, in the other, could otherwise dispose of same by legislative act.

If we view plaintiff as owner of lands on the lake to which riparian rights may attach, does he take the lake bed in dispute as alluvion or reliction? From the definition of the word, alluvion is the land formed by sedimentary deposits and added to an ordinary tract by the imperceptible action of the waters bordering the latter. It is a mode of acquiring property by natural law, *jure gentium*, by those principles or maxims which regulated the conduct of men before the formation of civil society (*Morgan v. Livingston*, 6 Mart. (La.) 242), and is recognized by the statutory law as a means of the acquisition of property: Civ. Code, sec. 509.

Dereliction, or reliction, is land added to a front tract by the permanent uncovering of the waters; the laying bare of the bottom by the retirement of the waters, as contradistinguished from the building up of the bottom by deposits causing the waters to recede. Dereliction, as used by the English law,

meant when the sea shrank back below the usual water mark and remained there. In those cases the law (English) is held to be that, if this be by little and little, it shall go to the owner of the land adjoining: *Morgan v. Livingston*, 6 Mart. (La.) 244. It is recognized (excluding the sea) by the Louisiana law as a mode of acquiring property: Civ. Code, sec. 510.

But the temporary subsidence of the waters, occasioned by the seasons, coming in the winter and staying through the spring, going in the summer and gone through the autumn, does not constitute dereliction, in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. There is no "increase of the land" in such case. The reliction must be from the waters in their usual state. Where it periodically rises up over the land and then recedes, there is no reliction: *Bouvier's Law Dictionary*, verbo "Reliction"; *Milne v. Giradeau*, 12 La. 324; *Zeller v. Southern Yacht Club*, 34 La. Ann. 839.

The lake bottom, where defendants were preparing to cut grass, cannot be said to be accretions or alluvion, in the sense of the code, for the testimony shows no alluvial or other deposit whatever has been made there for forty years, or as far back as any of the witnesses who testified in the case had knowledge of.

It cannot be dereliction, for the same witnesses testify to no change in the bottom of the lake, and no change in the characteristics ¹⁷²⁴ of the lake for forty years. There has been no dry land formed by "running water retiring imperceptibly from one of its shores and encroaching on the other": Civ. Code, sec. 510. There has been no change in the shores of the lake. Its banks do not and have not caved. Nothing has been taken from one shore and added to the other. There has been no permanent uncovering of the waters; no laying bare of the bottom by the retirement of the waters to stay; no shrinking back of the waters below the usual water mark and the remaining of the same at the point of shrinkage. It is true its bed, or large part of it, becomes measurably dry and remains so more or less for four or five months in the year. But it becomes covered again with water, which remains over it six or seven months, and in turn runs off leaving the bed exposed, and this successive recurrence of conditions has been going on without any change from time immemorial. There has been no decrease in the depth of the water (from six to ten feet) covering the hay field in dispute, except such as might result from a larger volume

of water filling the lake one season and a less volume another season. But this is more or less an accidental fluctuation, depending on the rainfall of one season exceeding that of another, and the water in the Red river being higher one year than the next, or vice versa.

When plaintiff purchased his holdings on the lake, as well as since his purchase, exactly the same annual rise and fall of its waters was and has been going on, as was the case when his vendors acquired their titles, and during the years they held the land. Indeed, it is clear that the same conditions exist now as to this annual flow and ebb of the waters as existed long prior to the time plaintiff's vendors acquired title.

If there be land now in the bed of the lake in front of the plaintiff's holdings attachable thereto as accretions or as reliction, it existed in the same degree and condition during the time his vendors held the title, there having been no change. And if his vendors acquired as alluvion or dereliction the lake bed to which he now asserts right of ownership, they did not part with title to the same in their act of conveyance to him, for no mention whatever of its disposition to him is recited in such deeds either in express terms, or appears therefrom by implication. For them to have intended to include it in their conveyances to him (supposing they then owned it), it was necessary such intention ¹⁷²⁵ should have been expressed in the deed: *Barre v. New Orleans*, 22 La. Ann. 612; *Livingston v. Hoorman*, 9 Mart. (La.) 658; *Cochran v. Fort*, 7 Martin, N. S., 624; *Cire v. Rightor*, 11 La. 142; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 229, 36 Am. Dec. 624; *Martin v. Singleton*, 23 La. Ann. 551; *Ferriere v. New Orleans*, 35 La. Ann. 209.

The original grant or patent of the land bordering on the lake owned by plaintiff came from the United States. But it is well settled that where the United States has made grants, without reservation or restriction, of public lands bounded on streams or other waters, the question whether the lands forming the beds of the waters belong to the state, or to the owners of riparian lands, is to be determined entirely by the law of the state in which the lands lie: *Hardin v. Jordan*, 140 U. S. 371; *Packer v. Bird*, 137 U. S. 661; *Lamprey v. State*, 52 Minn. 187, 38 Am. St. Rep. 541.

There has been no increase of land, whether by alluvion or dereliction between the tract occupied by plaintiff and the lake since the date of his purchase, and there was none before. Therefore, under the law of Louisiana, there has been nothing

for him to take, even giving him the benefit of the pretensions he asserts as riparian proprietor. The modes or ways of the acquisition of property are limited to those prescribed by law: *Zeller v. Southern Yacht Club*, 34 La. Ann. 839. He must be held to have had no greater right to the portion of the lake bed in dispute than defendants had, and no more right than they to cut grass there. It follows that no sufficient cause for the injunction herein sued out existed, and that the same was properly dissolved.

We think the judgment appealed from should be amended by allowing defendants damages as attorneys' fees for dissolving the injunction, and further amended by reserving to them the right to claim such further and additional actual damages, if any suffered, to which they may legally be entitled.

Defendants, however, had no right to the exclusive use of this hay field in the bottom of the lake which they occupied when plaintiff interfered. They had no right to post the same, nor fence the same, nor exclude others from it, nor deny to others the right to cut grass there. They had, of course, no property right in the grass there, and can claim nothing in the way of damages on that score.

We do not think it can be called trespassing on the public domain, whether of the state or the United States, for individuals to merely cut grass on the lake after the subsidence of the waters. But no one ¹⁷²⁶ can take such possession of the lake bed, or any part of it, for such purpose so as to exclude others from it. No priority of right to any particular spot or place in the lake bed is possessed by anyone, and no such spot or place can be held by anyone against the entry upon the same by others for grass cutting purposes.

The lake and lake bed are free to all to enter upon it, or any part of it, for any purpose not unlawful, and no one may claim any privilege there superior to others. As the situation is, the lake bed is a public place open to the legitimate use of all alike.

For the reasons assigned, it is ordered, adjudged, and decreed that so much of the judgment of the court a qua as rejects plaintiff's demand, and dissolves his injunction, be and the same is hereby affirmed.

It is further ordered, et cetera, that so much of the said judgment as rejects defendants' demand in reconvention be avoided and reversed, and it is now decreed that defendants, Frazier and Noles, do have and recover of the plaintiff the sum

of one hundred and twenty-five dollars damages as attorney's fees for dissolving the injunction, and that, on the remainder of their claim for damages, there be judgment of dismissal as in case of nonsuit, costs of both courts to be paid by plaintiff.

Mr. Justice Monroe takes no part, as he was not a member of the court when this case was heard.

ALLUVION AND ACCRETION.—Accretion is an increase or addition to riparian land gradually and imperceptibly made by alluvial formations of soil or sand, occasioned by the water to which the land is contiguous, through either natural or artificial causes. To create an accretion by alluvion there must be an addition to land coterminous with the water, formed so slowly that its progress cannot be perceived: Monographic note to *Coulthard v. Stevens*, 35 Am. St. Rep. 307. "Alluvion" is the term applied to the deposit itself, while "accretion" denotes the act: *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195. See the extended note to *Hagan v. Campbell*, 33 Am. Dec. 276.

ACCRETION AND RELICTION.—If accretions come to riparian proprietors of lands bounded by meandered lakes, they take to the water's edge, and follow the gradual recession of the waters to their edge, but if a large body of land is suddenly and perceptibly formed by reliction, it belongs to the state: *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380.

RELICTION differs from alluvion in this, that the term is applied to land made by the withdrawal of the waters by which it was previously covered. Title to land thus made will vest in the adjacent proprietor, if the withdrawal of the waters was slow, gradual, and imperceptible: Extended note to *Hagan v. Campbell*, 33 Am. Dec. 280; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23.

WATERS—LAKES—TITLE—RIGHTS.—Title to land under lakes: See the extended note to *People v. Kirk*, 53 Am. St. Rep. 289; *Revell v. People*, 177 Ill. 463, 69 Am. St. Rep. 257. The state holds the title to lands under navigable lakes in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties: Monographic note to *People v. Kirk*, 53 Am. St. Rep. 295.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

FENTON v. MILLER.

[116 MICHIGAN, 48.]

COTENANCY—USE AND OCCUPATION—ALLOWANCE FOR ON PARTITION.—To justify a recovery under a statute limiting recovery against a cotenant to moneys actually received by the tenant in possession in excess of his just proportion of the rents and profits, he must have actually received such rents and profits. His exclusive occupancy is not enough to create liability; but the statute does not impair the right of the tenant against whom the premises have been held adversely to have an allowance made on partition for the value of the use and occupancy.

COTENANCY—PARTITION—ALLOWANCE AGAINST WIDOW FOR USE AND OCCUPATION.—The widow of a deceased cotenant, who, after his death, holds the entire premises adversely to her cotenant is liable to him in partition proceedings for the rental value of his undivided interest, notwithstanding her homestead and dower rights in the undivided interest which belonged to her husband.

COTENANCY—DEMAND FOR POSSESSION.—The commencement of an action of ejectment by one cotenant against another, who has excluded him from possession of the premises, is a sufficient demand to be let into possession.

COTENANCY—PARTITION—ACCOUNTING—LIMITATIONS.—If, in partition proceedings between cotenants, the one who has had exclusive possession for a number of years, asks credit for improvements made during that time, he cannot have the statute of limitations applied against the excluded tenant's right to an allowance for use and occupation during the same time.

COTENANCY—PARTITION—IMPROVEMENTS.—A cotenant who makes substantial improvements on the common property is entitled, upon the sale of the property in partition, to have such improvements considered in determining what is a just division of the proceeds.

COTENANCY—PARTITION—ACCOUNTING—RENTS AND IMPROVEMENTS.—If, in proceedings in partition between coten-

ants, one has been in exclusive possession for a number of years, and made valuable improvements, and the excluded tenant is to be allowed for rental, the improvements should be charged at cost, as against the charge for rental, when the expenditure for improvements was a disbursement in order to make the premises rentable at the price charged in the accounting.

COTENANCY — PARTITION — ACCOUNTING — INSURANCE.—A cotenant in possession is not entitled, upon partition, to be allowed for insurance paid by him, when such insurance did not inure to the benefit of the excluded tenant.

H. Hoffman and C. R. Brown, for the appellant.

J. McNamara and J. Atkinson, for the appellee.

⁴⁷ **MONTGOMERY, J.** Complainant filed the original bill in this case, praying for a partition of lot 12 in the village of Mackinac. An answer was put in, and subsequently proceedings were stayed until the title of complainant could be established at law. This complainant was able to do (see *Fenton v. Miller*, 108 Mich. 246); and thereupon, on the fifth day of October, 1896, an amended and supplemental bill was filed, setting up that, since the filing of the original bill, Annie M. Wendell-Miller and Eva M. Wendell-McKinnon had conveyed their interests in the property to Romain I. Wendell, and praying partition, or, if the property could not be divided without prejudice, that it be sold, and the proceeds divided, and that an account be taken of the rents and profits. The interest of complainant, as alleged in the bill, and as established on the trial, is thirteen twenty-firsts. The remaining eight twenty-firsts was, after the conveyance to Romain I. Wendell, wholly vested in her. On the same day that the amended bill was filed, an answer was filed by Annie M. Wendell-Miller, which set up that the defendant had spent large sums in improvements, and asked a decree in her favor for the same. Mrs. McKinnon and Romain I. Wendell answer, alleging that their occupancy of the property was while they were minors and members of their mother's family, at least up to November 4, 1895, when Romain I. Wendell became of age, and that they are not properly chargeable with rents and profits during this time. On the filing of their answer, a consent decree was made, reciting that Romain I. Wendell had succeeded to the interests of her codefendants ⁴⁸ in the premises, defining the respective interests of the complainant and defendant as found in the suit at law, reciting that the premises were so situated that an equitable division could not be made, and providing for a sale of the premises, the payment of a portion of the purchase money

into court, and a reference to take testimony touching the improvements made upon the premises, taxes paid thereon, the rents received, et cetera.

In pursuance of this preliminary decree, a sale was made, at which complainant became the purchaser, at the price of \$7,500. Eight twenty-firsts of this sum, or \$2,849.24, was paid into court, and remains in the hands of the register of the court, to abide the final order of the court. The parties proceeded to take testimony touching the rents and profits, improvements, repairs, insurance, et cetera. The case was brought to a final hearing, and decree made, declaring: 1. That defendants Eva M. and Romain I. are not responsible for the rents and profits; 2. That defendant Annie M. Wendell should be charged with rents and profits, amounting to \$5,100 in the whole, thirteen twenty-firsts of which belong to complainant, viz., \$3,157.05; that she should be credited with improvements and betterments, \$1,737.21; with insurance paid, \$266; taxes paid, \$406.56—making a total of \$5,409.77, thirteen twenty-firsts of which is \$3,348.80, leaving a balance against complainant of \$191.75, from which was deducted eight twenty-firsts of certain taxes paid by complainant, \$25.52, leaving the final balance \$166.23, which was decreed to defendant Romain I. Wendell; 3. The costs were decreed to complainant. From this decree both parties appeal.

It is contended on behalf of defendants that no allowance should be made for the value of the use and occupancy of the premises by Mrs. Wendell. The statute (2 Howell's Statutes, sec. 5778) limits recovery against a cotenant to moneys actually received by the tenant in possession in excess of his just proportion of the rents and profits. This statute is a substantial re-enactment of the statute 4 Anne, chapter 16; and, under the English decisions, ⁴⁰ to justify a recovery under this statute, the tenant must actually have received rents and profits. His exclusive occupancy is not enough to create liability: *Henderson v. Eason*, 17 Ad. & E., N. S., 701. See, also, *Everts v. Beach*, 81 Mich. 136, 18 Am. Rep. 169. But this statute has not been construed as impairing the common-law remedies existing in favor of the cotenant who is excluded from possession by the occupying tenant. In such a case, he may maintain ejectment, and in another action recover the profits. Indeed, the most forcible reason given against a right to recover on a showing of mere occupancy is that plaintiff's mere omission to occupy ought not to constitute a ground of action

against one who occupies of right. In this case it appears by defendants' answer to the original bill, filed by Annie M. Wendell-Miller, December 24, 1886, that the premises had been adversely held by defendants; and, on the defendants' motion, the proceedings in this case were stayed until the title should be determined in ejectment. It is settled that on a partition it is competent for the court to adjust the equities of the parties, including rent to the excluded tenant: *Freeman on Cotenancy and Partition*, sec. 512; *Hoffman v. Ross*, 25 Mich. 175; *Hunt v. Hunt*, 109 Mich. 399.

It is also contended that as Mrs. Wendell occupied these premises as the widow of her deceased husband, having a dower interest and a homestead right therein, it is inequitable to charge her with the rental value of complainant's interest. The answer to this is, that her dower interest and homestead right only attached to the eight twenty-firsts part, and that she had the use of the entire premises, including complainant's share.

It is also claimed that there was no demand to be let into possession; but it appears that an action of ejectment was commenced in 1880, which we think a sufficient demand.

Some question is also made as to the effect of the statute of limitations; but, in the view we take of the accounting, this question is not of much importance, as, if the defendant ⁵⁰ is to have credit for the expenditures made since 1880 in betterments and improvements, it is apparent that it would be grossly inequitable to exclude all charges for rental value during the same period, as this would result in permitting the defendant to devote the avails of complainant's property to the purpose of creating a charge against him.

Complainant contends that defendant is not entitled to compensation for improvements; but we think, under the circumstances in this case, the circuit judge was right in holding that she is entitled to have the improvements considered in determining what is a just division of the proceeds of the sale. When premises are susceptible of division, the court will award to the party making the improvements the part on which the improvements are situated, and, when the entire premises are sold, it is equitable that the same result should be reached by awarding the increased value of the premises, by reason of the improvements, to the party making them: *Freeman on Cotenancy and Partition*, sec. 510. In such a case, however, it is but just to require that a party making claim for improvements offer to share their rents with his cotenant: *Freeman on Cotenancy and Partition*, sec. 511. For this reason, as before

stated, the statute of limitations cuts no figure in this case, as complainant does not insist on it, and as defendant, as a condition to asking complainant for improvements, should be required to account for rental value.

What should be allowed as compensation? The circuit judge allowed the present value of the improvements. This course is, doubtless, in accord with the general rule: Freeman on Co-tenancy and Partition, sec. 510. But defendant contends that, as against the charge for rental, the improvements should be charged at cost, as the expenditure was a disbursement in order to make the premises rentable at the price charged in the accounting. We think this contention is just. Either the complainant should be limited in his charge for rent to the value of the premises in their original state, or, if he is to have the benefit of the increased ⁵¹ rents, the defendant should have credit for the expenditures which made it possible to receive these rents. This is exact equity between the parties. We are disposed to adopt the figures of the circuit judge as to the rental value, viz., \$5,100. We think his figures are also substantially accurate as to the repairs and improvements, which include rebuilding of the homestead, and the building of an additional cottage, amounting to \$6,316.27. Defendant has also paid \$406.56 for taxes, making a total credit of \$6,722.83, which, less rental, leaves \$1,622.83. Complainant should be charged with thirteen twenty-firsts part of this, \$1,004.61. Complainant at one time paid taxes, \$67.19. He should be credited with eight twenty-firsts of this, being \$25.52, which, deducted from allowance to defendant, leaves \$979.09, which, with interest from date of sale, will be allowed to defendant.

That this case may not be misapprehended as a precedent, it should be stated that the present value of the improvements exceeds the sum allowed, and that the expenditures in excess of the present value of the improvements have in our computation been applied in the reduction of the rental. We make no allowance to defendant for insurance, for the reason that it does not in any way appear that the insurance inured to the complainant's benefit, and we do not deem the charge proper: Peoria etc. Ins. Co. v. Hall, 12 Mich. 209.

Complainant will be entitled to costs of the court below, to be paid out of this sum. Defendant will recover the costs of this court.

The other justices concurred.

COTENANCY—USE AND OCCUPATION.—If a cotenant in exclusive possession holds adversely to the other owners, or refuses to permit them to share in the possession or commits any other act which they may deem an ouster, he becomes answerable to them for the value of the use and occupation of their share of the property. In such a case, it is not material whether he makes profits or not: Monographic note to *Ward v. Ward*, 52 Am. St. Rep. 927-929.

COTENANCY—DEMAND FOR POSSESSION.—When a tenant in common brings ejectment against his cotenant, who sets up an adverse holding "against all persons," it is unnecessary for the plaintiff to show a previous demand for possession: *Harrison v. Taylor*, 83 Mo. 211, 82 Am. Dec. 159, and note.

COTENANCY—PARTITION—IMPROVEMENTS—STATUTE OF LIMITATIONS.—In a suit for partition, the claim of one of the cotenants for compensation for improvements made by him cannot be barred by the statute of limitations: *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733.

COTENANCY—IMPROVEMENTS.—The remedy to obtain compensation by a cotenant for improvements placed upon the common property can be asserted only in a suit for partition, in the absence of any promise by the other cotenants to pay therefor: *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733.

COTENANCY—PARTITION—ACCOUNTING—RENTS AND IMPROVEMENTS.—In partition, either of the parties may compel an accounting from the other, and in this accounting repairs or improvements and rents and profits may always be taken into consideration, and each of the parties be required to submit to what the court may deem to be equitable in relation thereto: Monographic note to *Ward v. Ward*, 52 Am. St. Rep. 940. A cotenant has, as against a claim for rents or for the value of the use and occupation, the right to offset expenditures incurred in the making of improvements suitable to the character and condition of the property: Monographic note to *Ward v. Ward*, 52 Am. St. Rep. 938. The cotenant is allowed, not the cost of the improvements, but such sum as, in the opinion of the court, they have added to the salable value of the property: Monographic note to *Ward v. Ward*, 52 Am. St. Rep. 939; extended note to *Robinson v. McDonald*, 62 Am. Dec. 484. Compare *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500.

SERVISS v. WASHTENAW CIRCUIT JUDGE.

[116 MICHIGAN, 101.]

GARNISHMENT.—A negotiable note is subject to garnishment after its maturity.

GARNISHMENT—DISCLOSURE—CONCLUSIVENESS.—A disclosure by a garnishee that he does not know whether a note past due, executed by him to the principal defendant, was still in the latter's hands at the time of the service of process is not conclusive against his liability to the plaintiff.

GARNISHMENT—NONRESIDENT DEFENDANT—SERVICE OF PROCESS.—The validity of substituted form of service upon the nonresident principal defendant in garnishment proceedings does not depend upon the disclosure of the garnishee or his denial of in-

debtedness, although no judgment can be had in such case against the principal defendant, unless some credits can be found in the hands of the garnishee. The existence of such credits is the subject of inquiry upon the statutory issue.

GARNISHMENT—JURISDICTION—SITUS OF DEBT.—The courts of a state may, by process of garnishment, acquire jurisdiction over a nonresident defendant for the purpose of subjecting a debt due him from a citizen of that state to the payment of plaintiff's demand.

Lawrence & Butterfield, for the relator.

A. Brown and M. J. Cavanaugh, for the respondent.

¹⁰¹ **LONG, J.** The relator is a resident of the state of Indiana. In November, 1897, Nellie A. Lennon, of Washtenaw county, this state, commenced an action in ¹⁰² the Washtenaw circuit court against relator by summons, and caused a writ of garnishment to issue against Edward S. Serviss, of Washtenaw county. The writ of garnishment was based upon an affidavit setting forth that the principal defendant was a nonresident of this state, and that said garnishee was indebted to the principal defendant in certain sums of money. Proceedings were thereupon taken, which are claimed to be in accordance with section 8087 of 2 Howell's Statutes, provided for substituted service upon nonresidents where property or credits of nonresidents have been garnished in this state; and a copy of said summons, affidavit for writ of garnishment, writ of garnishment, and return of the officer thereon of service upon the garnishee defendant were served upon the principal defendant in the state of Indiana. The garnishee filed a written disclosure, in which he stated that, at the time of the service of the writ upon him, he had made, executed, and delivered to the principal defendant three certain promissory notes, which remained unpaid, but that he did not know whether or not said notes were at the time of the service of said writ still held by the principal defendant. A demand was thereupon made by the plaintiff for an oral examination of the garnishee. The garnishee appeared, and gave testimony, which was taken by the court stenographer, and by him reduced to writing. This does not appear to have been signed by the garnishee, though it was filed in the case. On such direct examination, the garnishee testified that he still owed the principal defendant, who is his brother, about \$3,000. On cross-examination the following took place: "Q. Do you know whether you owe your brother anything or not? A. There are two ways of answering that.

Q. Do you know whether he held any papers at that time? **A.** No; I don't know that."

Upon further cross-examination he testified that he gave his brother three promissory notes—one for \$2,000, given ¹⁰³ in 1893; one for \$1,000, given in 1896; and one for \$633.38, given November 18, 1897; that he gave chattel mortgages with the first two notes, but could not state whether his brother held the mortgages when the garnishee process was served on him, November 27, 1897. It is conceded that the first note was past due when the process was served on the garnishee, and that the other two notes were not due at that time. A motion was made in the court to set aside the service on the principal defendant, upon the ground that it does not affirmatively appear by the disclosure that property or credits had been reached by garnishee process. This motion was denied; and relator now asks a mandamus to compel the circuit court to vacate the order denying the motion, and directing the entry of an order to set the service aside. A return has been made to an order to show cause, and the above statement is substantially what appeared in the court below.

It is contended by the relator that, before the circuit court has jurisdiction to proceed against the principal defendant, it must affirmatively appear that he had the notes in his possession at the time of service on the garnishee, and that it cannot be said that under this examination the garnishee defendant is indebted to the principal defendant. In *Littlefield v. Hodge*, 6 Mich. 326, it was said: "Garnishee process is not, we think, properly applicable to such paper [negotiable paper] until it ceases to become negotiable by falling due. The debtor cannot know certainly in whose hands his obligation may be when it matures, and his admission that such a note is outstanding cannot be effectual as an admission of an indebtedness to the original holder of such a character as to be a continuing liability in his hands. The courts have very generally, in the absence of statutes to the contrary, regarded negotiable paper as not liable to be reached in this way."

But it appears that the first note given was past due when the garnishee process was served. It was expressly held in *Somers v. Losey*, 48 Mich. 294, that a promissory note ¹⁰⁴ may be garnished after maturity. It is true that the garnishee defendant was unable to state whether or not any of the notes were still in the hands of the principal defendant at the time of the service of process; yet we think this disclosure is not

conclusive on the right of the plaintiff to further inquiry. In *Fearey v. Cummings*, 41 Mich. 376, it was said: "It became a question whether, in trying this issue, the denial made by the garnishees in their disclosures of all indebtedness to Nellis, and their denial of possession and control of any property, money, goods, chattels, credits, and effects belonging to him, was conclusive on the plaintiffs, except in so far as there might be occasion to inquire concerning fraud; and the plaintiffs insisting that it was not, and that they were entitled to controvert such denial, and the garnishees contending to the contrary, the circuit judge sustained the position of the garnishees. The court is unable to concur in this view. The issue instituted at the instance of the garnishees after their disclosure is one expressly ordained for the trial of the garnishees' liability to the plaintiffs (2 Comp. Laws 1871, sec. 6475), and it covers exactly the same ground to which the denial applies; and it occurs to ask for what purpose authorize a trial to be invoked if the matter has already been settled in favor of the garnishees by their denial?"

It was held, therefore, that the plaintiffs were entitled to make out an indebtedness from the garnishees to Nellis, notwithstanding this denial.

The statute referred to in that case is section 8068 of 2 Howell's Statutes, as amended. This section provides that, upon the filing of the disclosure, answers to written interrogatories, or report of the testimony or statement made by the garnishee on such personal examination in cases where such examination is had, "the matter of such affidavit [the affidavit for the writ of garnishment] shall be considered as denied (except so far as the same is admitted by such disclosure, answers to interrogatories, or report, which admissions shall have the effect of admissions in a plea, and also shall be prima facie evidence of the matters therein admitted). And thereupon a statutory ¹⁰⁵ issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff." The plaintiff in the suit followed the provisions of 2 Howell's Statutes, section 8087, in relation to bringing in the principal defendant, who was a nonresident of the state. The validity of this substituted form of service upon the principal defendant does not depend upon the disclosure of the garnishee defendant, or upon the denial of an indebtedness which he may make when interrogated thereon. No judgment could be had against the principal defendant, it is true, unless some credits were found in

the hands of the garnishee; but whether such credits are in his hands is the subject of inquiry which may be had upon the statutory issue, which is provided in section 8068 of 2 Howell's Statutes.

It is further contended that a debt due to a nonresident defendant from a citizen of this state is not property, effects, or credits within this state, and hence will not support the jurisdiction of the courts of this state for a proceeding in rem; that the domicile of a garnishee within this state does not give the courts of this state jurisdiction over the debts he owes to a party in another state, and is not sufficient to support an action in rem. It was held, however, in *Newland v. Wayne* Circuit Judge, 85 Mich. 151, that the statute points out the procedure to acquire jurisdiction over the principal defendant, not for the purpose of rendering a personal judgment against him, but to subject the choses in action in the hands of a third party to the payment of the plaintiff's demand; and to this extent it confers jurisdiction upon the court to proceed. It was there said: "It is not instituted for the purpose of the recovery of property, nor the enforcement of a lien thereon. Its primary object is to reach the res in the hands of third persons, against whom there is no foundation for a personal claim when the summons issues." The court below was not in error in refusing to set aside the service upon the principal defendant.

The writ must be denied, with costs.

The other justices concurred.

GARNISHMENT.—NEGOTIABLE PAPER is not subject to garnishment before maturity: *Hubbard v. Williams*, 1 Minn. 54, 55 Am. Dec. 68, and note thereto; *Wills v. Heath*, 75 Tex. 124, 16 Am. St. Rep. 876.

GARNISHMENT.—DISCLOSURE.—THE ANSWER of a garnishee is deemed true until disproved or contradicted: *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405. Judgment against a garnishee upon his disclosure: See *McLean v. Sworts*, 69 Minn. 128, 65 Am. St. Rep. 556, and note.

GARNISHMENT.—NONRESIDENT DEFENDANT.—JURISDICTION.—SITUS OF DEBT.—The garnishment of debts owing from residents to nonresidents is a matter of very common practice, jurisdiction of the nonresident creditor being obtained by publication of process, unless personal service within the jurisdiction is possible, or the defendant makes a voluntary appearance. To justify such practice, it must be admitted that the general and very reasonable rule of law that the situs of a debt for purposes of garnishment, as well as for all other purposes, is at the domicile of the creditor, is defective. In its place must be adopted the fiction of law that for purposes of garnishment the situs of a debt is at the domicile of the garnishee: *Extended note to National Bank v. Furtick*, 69 Am. St. Rep. 119.

PERKINS v. GROBBEN.

[116 MICHIGAN, 172.]

CONDITIONAL SALES—VOLUNTARY PAYMENT—GARNISHMENT—ESTOPPEL.—A payment enforced by garnishment proceedings is not voluntary, and does not estop the debtor from insisting that the creditor has previously satisfied his claim by taking possession of property under a conditional sale constituting the basis of the claim.

CONDITIONAL SALES—RESERVATION OF TITLE—ACTION FOR PURCHASE PRICE.—Under a conditional sale with reservation of title in the vendor until the purchase price is paid, and providing that upon the default of the vendee in the payment of either of the purchase money notes, the vendor may retake the property, whereupon all payments previously made shall be deemed for the use, wear, and tear of the property, and that the commencement of suit upon the notes shall not be deemed a waiver of the right to retake the property, the vendor is entitled, upon the default of the vendee, either to retake the property or to sue on the notes and retake and retain the property until the judgment is paid, but he cannot retake the property, apply one-half of its invoiced price upon the notes for its use, wear, and tear, and maintain suit for the balance.

Wolcott & Ward, for the appellant.

Pratt & Davis, for the appellees.

173 MOORE, J. In 1893 plaintiff received from defendants, and filled, an order for shingle-mill machinery to the amount of two thousand six hundred dollars. Defendants paid thereon eight hundred dollars in cash, and gave their notes for three hundred dollars, seven hundred dollars, and eight hundred dollars. These notes all read alike, except the amounts and times of payment. The first one reads as follows:

“\$300. No. 1. Grand Rapids, Mich., Aug. 1, 1893.

“June 15, 1894, after date, we promise to pay to the order of Perkins & Co. three hundred dollars at Old National Bank, Grand Rapids, Mich.; value received; with interest at eight per cent per annum until due, and thereafter at eight per cent until paid.

“This note is one of three notes of even date, given for part of purchase price of two Perkins & Co. Michigan Favorite shingle machines. . . . It is expressly agreed that the title and ownership of all said property shall remain in Perkins & Co. until the full purchase price is paid; and, in case of any default in the payment of this or any or either of said notes, all said notes shall, at the option of Perkins & Co., notice of which is

hereby waived, become and be at once due and payable, and said property may be taken back by said Perkins & Co., and in such case all payments made, and amounts collected, on this or any of said notes, shall be deemed to be payments for the use, wear, and tear of the said property up to the retaking thereof. It is further expressly agreed that, upon default in the payment of this or any or either of said notes, Perkins & Co. may commence suit upon the same, which shall not be a waiver of Perkins & Co.'s title to said property, and the same may be retaken by them under this note, or any of said notes, upon default thereon, as hereinbefore ¹⁷⁴ provided. It is further agreed that no agreement in regard to said property made after this date, or new notes, collateral or additional security, taken by Perkins & Co., shall in any way waive, transfer, or release their title to said property, it being expressly agreed that the title to said property shall, under all circumstances, remain in Perkins & Co. till this and all of said notes are canceled, delivered up, or assigned by Perkins & Co. After maturity of any of said notes, Perkins & Co. may keep said property insured at makers' expense, premium of such insurance to be added to this note.

"GROBBEN & HITCHCOCK,

"Per William Hitchcock."

Afterward a chain was returned by consent of the plaintiff. The defendants not paying the notes, the plaintiff took possession of the machinery, and returned it to Grand Rapids. Plaintiff sent a statement to defendants, crediting them with the amount of the machinery taken, at inventory price, less fifty per cent on account of being depreciated, the statement showing a balance due plaintiff of one thousand one hundred and seventy-six dollars, accompanied by a letter reading as follows:

"July 9, 1895.

"Grobben & Hitchcock, Leland, Mich.

"Gentlemen: We have received and unloaded the shingle machinery, and carefully inspected the same, and inclose you herewith credit memorandum for the valuation we have placed on same. We also hand you herewith a statement of your account with us to date, after crediting you with the machinery received, as per inclosed credit memorandum. We ask you what is your pleasure in regard to the settlement for balance due? Owing to the ill-treatment that we have received at your hands in regard to settlement of your account with us, we do not feel that you are entitled to any extended courtesies in regard to

the payment of this balance. We should therefore be pleased to hear from you regarding same by return mail, awaiting the favor of which we remain,

“Very respectfully yours,
“PERKINS & CO.,
“Per Everhart.”

Some statement is made in the brief of counsel as to ¹⁷⁵ what became of the machinery after it passed into the possession of plaintiff, but we are unable to find from the record what became of it. The defendants paid no attention to the letter of July 9, 1895. In August, 1896, this suit was begun by plaintiff, who declared upon all the common counts in assumpsit, with notice that under the money counts he would give in evidence the three notes in question. After the testimony was all in, the court directed a verdict in favor of the defendants, assigning as a reason that the exercise of the option to take the property was a satisfaction of the debt, the judge expressing himself as follows:

“But the simple question to be determined now is whether or not the plaintiffs, having pursued one remedy, namely, by taking the property, resuming possession of it under their title, have waived all claims to enforce the notes. That is the sole question that is to be determined now. I think it is proper to consider the other question in the same connection as bearing upon what should be the true interpretation of the contract. Then the contract further provides that: ‘Upon default in the payment of this or any or either of said notes, Perkins & Co. may commence suit upon the same, which shall not be a waiver of Perkins & Co.’s title to said property, and same may be retaken by them under this note, or any of said notes, upon default thereon, as hereinbefore provided.’ Now, there is a stipulation that the plaintiffs may commence suit upon these notes, and not thereby waive their right to resume possession under their title. But the converse of that proposition is not stated. It is not provided that they may take the property, and that shall not be any waiver of their right to sue and collect upon these notes. Now, is there not an implied waiver by virtue of the provision that is contained in it that covers the agreement in relation to the title to the property and the remedies under the contract? Now, the plaintiffs have taken possession of this property under a contract of this nature, which provides expressly that the title remains in them, and that they may take possession on default, and that all payments previously made

shall be applied as compensation for the use, wear, and tear. Is it not a proper inference, and is it not a proper conclusion of law, to say that when they exercise that right under that contract to take the ¹⁷⁶ property, and apply what has been paid in that way, it determines the whole matter?

"The law does not favor the enforcement of two remedies. The law recognizes the right of a party to secure his claim by as many securities as he can get; but it does not recognize his right to enforce more than one to complete satisfaction. I think the true interpretation of this contract is, that the parties reserved the right to commence a suit, and provided that it should not be a waiver of their right to take the property, but they did not reserve any right to sue and collect upon these notes after repossessing themselves of the property. And to allow that to be done would be to allow them to take the property, which the law conclusively presumes, under their contract, was full payment, I think, of any balance that might be due after such time as the plaintiffs might see fit to make the application of prior payments for the use, wear, and tear of the property. Here they had a contract that might have been enforced five months before, and applied the payment on the wear and tear and use of the property. They saw fit to let it run five months, and then, when they took the property, that application is made. 'Up to the time of the retaking' is the language of the contract. Then, by the very terms of the contract, the money paid prior to the retaking went to the plaintiffs as compensation for the use, wear, and tear of the property. They selected the time of taking it. They might have taken it earlier, and the fact that they took it so much later, I think, is quite conclusive that they deemed that the prior payments were adequate for the use, wear, and tear of the property up to that time, and that the property at that time was of sufficient value to pay the balance of the claim."

The case is brought here by writ of error. Some controversy arose about the question of estoppel because of a payment of sixty dollars claimed to have been made by defendants after the letter of July 9, 1895. That payment resulted from a garnishee process. The circuit judge was of the opinion that it was not a voluntary payment by defendants, and did not affect the other questions in the case. We think he was right, and shall not discuss that feature of the case further.

It is the contention of the plaintiff that, notwithstanding he has received back the machinery after it had been used ¹⁷⁷

about sixty days, which was billed at two thousand six hundred dollars, and has received a payment of eight hundred dollars, he is still entitled to a judgment for the face of the notes and interest, and he urges that this would not be unjust, because the parties have so agreed, and they must be presumed to know the effect of their agreement; and it is also said: "That the proper construction of the contract is that, under such circumstances, plaintiff cannot lawfully retain the property on being tendered his money, and that, therefore, the mere retaking of the property cannot be treated (as was done by the trial court) as an application of all prior payments toward the use, wear, and tear, et cetera, of the machinery, and as an election of remedies so as to prevent his maintaining an action on the notes."

This was not the construction put upon the contract by the plaintiff when he credited the defendants with the inventory price of the machinery taken back, less fifty per cent for depreciation, and wrote them July 9, 1895: "We also hand you herewith a statement of your account with us to date, after crediting you with the machinery received, as per inclosed credit memorandum. We ask you what is your pleasure in regard to the settlement for balance due? Owing to the ill-treatment we have received at your hands in regard to the settlement of your account with us, we do not feel that you are entitled to any extended courtesies in regard to the payment of this balance."

There was nothing in this letter indicating that plaintiff recognized any obligation to return the property upon a tender of the amount due upon the notes, or that he was holding it for the purpose of enforcing the lien he had upon it for the amount of his debt.

Does the law give the contract any such construction as is now claimed by counsel? Counsel do not call our attention to any cases directly in point, but cite *Hays v. Jordan*, 85 Ga. 741; *Preston v. Whitney*, 23 Mich. 260; *Johnston v. Whittemore*, 27 Mich. 463; *New Home Sewing Machine Co. v. Bothane*, 70 Mich. 443; *Thirlby* ¹⁷⁸ *v. Rainbow*, 93 Mich. 164; *White v. Solomon*, 164 Mass. 516, and other cases, claiming that the reasoning employed by the court tends to support their contention. So far as these cases are in point at all, we think they are against the position of the plaintiff. In the last-named case, Chief Justice Field wrote an opinion, which was joined in by two of the other judges, in which he said: "The contract, I think, is, in

effect a contract for a conditional sale, and the intention is, that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract the plaintiffs are authorized to retake the manikin without being accountable to the defendant for any of the money paid by him on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article, and it is returned to and retained by the vendor? I think that the construction to be given to the contract is that, if the defendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant, and retain what he has paid on account of the price, or they may leave the manikin in the possession of the defendant, and sue him for the installments of the price which remain unpaid; but the plaintiffs cannot collect the whole price, and also retake the manikin. They cannot hold the title to the property, and also recover the price of it."

It is not agreed in the contract that, if the property is retaken, and the payments made up to that time are treated as payments for the use, wear, and tear of the said property, that the vendor may also sue for the amount due on the notes. After the vendor has taken possession of the property, the contract does not give the vendees any further interest in it. The character of the contract, and the results which may be worked out under it, are not such as to make it desirable to read into it provisions it ¹⁷⁰ does not contain. The contract provides for two ways of enforcing it. The plaintiff might sue on the note, and retain the property until the judgment was paid, or might retake the property, and treat the payments up to that time made as payments for the use, wear, and tear of the machinery, but he cannot do both. The plaintiff has taken possession of the property as the owner thereof. What have the defendants had as the consideration of the note? They acquired no title or interest in the property, and could not until they paid the notes. They could not call the plaintiff to account for a disposition of the property, if he has made any, because they had no interest whatever in it, having made default in the payment of the notes, the vendor having exercised his right, under the contract, to take possession. The defendants have simply had

for the notes the use of the property, and for that use they have paid the eight hundred dollars, which the contract gives the vendor the right to so apply. The vendor is not entitled to the title and possession of the property, and to be paid for it also: *Seanor v. McLaughlin*, 165 Pa. St. 150; *Bailey v. Hervey*, 135 Mass. 172; *Earle v. Robinson*, 91 Hun, 363, 36 N. Y. Supp. 178; *Campbell etc. Mfg. Co. v. Hickok*, 140 Pa. St. 290; *Scott v. Hough*, 151 Pa. St. 630; *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Green v. Sinkov*, 135 Ind. 434. See, also, *Vaughn v. McFadyen*, 110 Mich. 234.

Judgment is affirmed.

The other justices concurred.

IN THE CASE of *Choate v. Stevens*, 116 Mich. 28, it was held that a promissory note reciting that the consideration for it and certain other notes was a soda fountain described in a contract of sale of even date therewith, that the maker of the notes to whom the fountain had been delivered was to acquire no title thereto until all of the notes were paid, and that the payee was to have the right upon default in the payment of either of the notes at maturity to retake possession of the fountain and remove it, imports an absolute and not a conditional sale, with a reservation of the title to the property by way of security. The recitals in such note do not destroy its negotiability.

GARNISHMENT—DEFENSES.—INDEBTEDNESS IS NOT LIABLE to garnishment unless it is absolutely due as a money demand, unaffected by liens, prior encumbrances, or conditions of contract, and, except in case of fraud, the creditor cannot claim any higher rights against his garnishee than the debtor could claim against him: *Holker v. Hennessey*, 143 Mo. 80, 65 Am. St. Rep. 642. The person garnished may, prior to the service of notice upon him, have made some valid contract affecting the defendant's right to enforce the collection of the debt. This contract, if made in good faith, cannot be avoided, impaired, or varied by the garnishment. The garnishee may assert it against the judgment creditor as fully as he was entitled to assert it against the judgment debtor: *Notes to Hanna's Syndics v. Loring*, 10 Mart. 568, 18 Am. Dec. 839.

CONDITIONAL SALES—REMEDIES OF VENDOR.—The right of a vendor to pursue particular remedies in accordance with the terms of a conditional sale: See *Orompton v. Beach*, 62 Conn. 25, 36 Am. St. Rep. 823; *Tufts v. D'Arcambal*, 55 Mich. 185, 24 Am. St. Rep. 79.

HAVILAND v. CHASE.

[116 MICHIGAN, 214.]

TRESPASS—EVIDENCE.—In an action of trespass *vi et armis*, based upon the forcible removal of a wife from premises occupied by herself and husband as a homestead, a writ of assistance against the husband alone, under which defendant assumed to act, is admissible in evidence, not as a justification, but as part of the *res gestae*, and as bearing on the question of damages.

TRESPASS—EJECTMENT OF WIFE FROM HOMESTEAD—JUSTIFICATION.—A writ of assistance issued in a proceeding against the husband alone, while he and his wife were occupying premises as a homestead, is no justification for the ejectment of the wife from the homestead.

TRESPASS—PUNITORY DAMAGES.—In an action of trespass *vi et armis*, compensatory damage is the limit of recovery and punitive or vindictive damage by way of punishment cannot be awarded, although the trespass was actuated by malice or a reckless disregard of plaintiff's rights.

W. P. Van Winkle and D. Shields, for the appellant.

L. E. Howlett and Watta, Bean & Smith, for the appellee.

215 MONTGOMERY, J. The plaintiff brought suit for trespass to the person, and gave evidence tending to show that while she was living in a house in Iosco township, Livingston county, where she had resided for some eleven years, with her husband, Charles J. Haviland, defendants forcibly removed her from the premises; that she was not at the time in good health; and she also offered testimony to show some other circumstances of aggravation. The defendants attempted to justify under a writ of assistance in the hands of defendant Chase, who was at the time sheriff. This writ was issued in a proceeding against Louis A. Haviland, Louis J. Haviland, and Charles J. Haviland, which was instituted in 1888, at the time when plaintiff was occupying the premises with her husband. The case really presents but few questions.

It is contended that there was no evidence connecting Gordon with the trespass, but we think the testimony was ample, both as against him and the defendant Wellman.

Error is assigned upon the refusal to admit the writ in evidence. This writ was no justification, but we think it was admissible as a part of the *res gestae*, and as bearing on the question of damages, within the holding of this court: *Sutherland v. Ingalls*, 63 Mich. 620, 6 Am. St. Rep. 332. We think it clear that the writ could afford no authority as against the plaintiff. She had such a right in this homestead as **216 en-**

titled her to be made a party: *Spalti v. Blumer*, 56 Minn. 523. We have held that in ejectment the wife in actual occupancy of the homestead is a necessary party (*Sessions v. Sherwood*, 78 Mich. 234; *Kalkes v. Storms*, 93 Mich. 480), and that this is equally necessary in a case where the plaintiff is proceeding after the foreclosure of a purchase money mortgage: *Gibbs v. O'Neil*, 85 Mich. 633. The reason for this is clear. The fact that the homestead right may be subordinate to the lien of the mortgage does not bar the right of the wife to redeem from such mortgage in protection of her homestead right: See *Spalti v. Blumer*, 56 Minn. 523.

We feel constrained to hold that the learned circuit judge erred in the instruction given to the jury on the subject of damages. The court charged: "I have already given you some general instructions relative to the question of 'actual damages'—that is, the amount of the actual loss suffered or sustained by the plaintiff by reason of the trespass complained of. There is in the law another element of damages designated as 'exemplary' or 'punitive' damages. Such damages, if given at all, are only given by way of punishment of the defendants in case that, in the commission of the trespass complained of, they were actuated by malice or a reckless disregard of plaintiff's rights."

The rule has obtained in this court for many years that damages in civil cases should be limited by some rule of compensation. This rule was announced, upon full consideration, in *Scripps v. Reilly*, 38 Mich. 10, and has been adhered to since. It is true charges have been sustained where exemplary damages have been referred to as "punitive" or "vindictive": *Ross v. Leggett*, 61 Mich. 452, 1 Am. St. Rep. 608; but the court has in no case not depending on the statute given sanction to the distinct instruction that the jury may award a sum by way of punishment to the defendant, by whatsoever term such sum may be designated. The law recognizes that acts of indignity to the person or reputation may give an added smart or injury to the feelings if actuated by malice or committed in wanton disregard ²¹⁷ of plaintiff's rights; but the theory upon which damages are increased because of these motives is that the injury is deemed to be greater. Therefore, it has been held that an instruction that the jury may award damages by way of punishment is improper: *Stuyvesant v. Wilcox*, 92 Mich. 233, 31 Am. St. Rep. 580; *Stilson v. Gibbs*, 53 Mich. 283; *Wilson v. Bowen*, 64 Mich. 133; *Lucas v. Michigan etc. R. R. Co.*, 98 Mich. 5, 39 Am. St. Rep. 517.

The only apparent exception to this rule is created by statute—section 2283b8 of 3 Howell's Statutes, which provides for the recovery of actual and exemplary damages. In my own view, the recovery under this statute ought not to include smart-money, but should be limited to such increased compensation for injury to feelings as could fairly be said to follow from wanton or willful invasion of rights (see *Ford v. Cheever*, 105 Mich. 679); but the statute has not always had this construction. The present case does not, however, arise under the statute.

The judgment will be reversed and a new trial ordered.

The other justices concurred.

TRESPASS—EVIDENCE.—In trespass for personal injury, all circumstances of the transaction may be shown under the general issue to have such effect as they deserve in determining the verdict, by mitigation or otherwise: *Sutherland v. Ingalls*, 63 Mich. 620 6 Am. St. Rep. 332.

WRIT OF POSSESSION—EJECTMENT OF WIFE.—A writ of possession against the husband, in an action of ejectment to which the wife is not a party, is ineffectual to dispossess her of land on which she lived, and which she had title to and claimed as her separate estate prior to the commencement of the action in ejectment: *Bushong v. Rector*, 32 W. Va. 311, 25 Am. St. Rep. 817.

TRESPASS—DAMAGES.—In trespass *vi et armis*, the damages are not to be limited to the value of the property destroyed, and the interest thereon, and vindictive damages for the force, but the jury may give special damages for circumstances of aggravation attending the act: *Churchill v. Watson*, 5 Day, 140, 5 Am. Dec. 130; *Welch v. Durand*, 86 Conn. 182, 4 Am. Rep. 55; *Anonymous*, Minor, 52, 12 Am. Dec. 81.

WHEELER v. DIME SAVINGS BANK

[116 MICHIGAN, 271.]

ASSOCIATIONS—BENEFIT SOCIETIES—INSOLVENCY—RIGHTS OF MEMBERS.—A member of an insolvent foreign benefit society cannot, through garnishment proceedings commenced after the appointment of a receiver in the state where such society is incorporated and before the appointment of an ancillary receiver in another state, subject property of such society within the latter state, to a judgment upon a membership certificate maturing after the institution of insolvency proceedings, but before a receiver is appointed.

W. I. Robinson and G. Gartner, for the appellant.

O. E. Warner, for the appellee.

271 **HOOVER, J.** The Supreme Sitting of the Iron Hall was a mutual benefit association, organized under the laws of Indiana. For a more complete understanding of its nature,

objects, powers, and methods, reference is made to the cases of *Baldwin v. Wayne Circuit Judge*, 101 Mich. 119, 432; *Cohen v. Order of Iron Hall*, 105 Mich. 283; *Wheeler v. Order of Iron Hall*, ²⁷² 110 Mich. 437. The plaintiff became a member of this society and received a relief fund certificate in August, 1885, maturing in seven years. In July, 1892, the society became insolvent, and on August 23, 1892, the superior court of Marion county, Indiana, appointed a receiver, who qualified upon the same day upon a bill filed in July, praying for a receiver, and the closing of the affairs of the corporation, and distribution of assets. On August 27, 1892, the plaintiff, a resident of Michigan, began an action upon his certificate, and garnishment proceedings against the Dime Savings Bank. The action against the principal debtor resulted in a judgment on March 4, 1896, which was affirmed in this court. Proceedings were then taken to obtain a judgment against the garnishee, the disclosure having shown that it had a deposit to the credit of the local branch of the Iron Hall. This was contested by the receiver, and the plaintiff appeals from a judgment in favor of the garnishee defendant.

We now return to the proceedings to distribute the assets of the society. A month or so after the commencement of the plaintiff's actions, a receiver was appointed by the Wayne circuit court, in proceedings ancillary to those in Indiana. Those proceedings were before this court twice; first in *Baldwin v. Wayne Circuit Judge*, 101 Mich. 119, where it was held that the fund in the possession of the local branch was the property of the Supreme Sitting of the Order of the Iron Hall, and that it was proper to direct the ancillary receiver to turn over the funds in his possession to the receiver when it was made certain that the members from this state would share proportionately with members elsewhere. That decision recognized the right of the plaintiff to try the question of his alleged superior right to the fund garnished in the garnishment proceeding. In another proceeding an attempt was made to compel the circuit court to enjoin the prosecution of similar garnishment proceedings, but this was denied upon the ground that the discretion of the circuit judge should not ²⁷³ be interfered with. It was also said that the plaintiff in that case had a right to try the question of a lien by virtue of his garnishment proceedings in that case: *Baldwin v. Wayne Circuit Judge*, 101 Mich. 432. The circuit court, having become satisfied that members in Michigan would be permitted to receive their pro-

portionate share of the assets, made an order that the Michigan receiver turn over the fund in his possession to the Indiana officer.

The exact question before us is whether, after the appointment of the Indiana receiver, and before he had succeeded in acquiring possession of funds in Michigan—to which we have held that he was entitled, under the rule of comity—the plaintiff could, by superior diligence, obtain an advantage over his fellow members, whose interests in the concern in common with his own were represented by the receiver, or whether he was obliged to content himself with the opportunity of sharing pro rata through the distribution to be expected from the Indiana proceedings. That it would be inequitable to allow him to appropriate the funds to the exclusion of others holding matured certificates is obvious. It may be that there are plain debts sufficient to absorb the entire fund. It may be that the only way in which he could obtain payment from the receiver would be through an assessment of the members. Were this a suit in equity, it would be easily disposed of by relegating him to the Indiana tribunal by the application of the maxim that “he who seeks equity must do equity.” But in a court of law a legal reason is required for depriving him of the lien of the garnishment which he obtained before the ancillary receiver was appointed. This must rest on one of two grounds: 1. That the law of Michigan recognizes the right of the Indiana receiver to the property, from the date and by virtue of his appointment; 2. That the relation of the plaintiff to the corporation and the other members is such as to deprive him of the legal right to satisfaction of his debt from the assets after the appointment of the Indiana receiver. In a ²⁷⁴ sense, perhaps, the latter is included in the former proposition.

Passing a discussion of the former, we will examine the latter. We have shown the inequity of the plaintiff's position. Wherever such a claim has been asserted in equity, it has been denied, so far as we have been able to ascertain, upon the ground that the member has contracted with reference to the law of the state which created the corporation of which he became a member, and must therefore submit to the jurisdiction and judgments of its courts in case of the insolvency of the corporation. It would seem that this would be a defense at law as well as in equity, and it appears to be so held. See the following cases cited by counsel: *Weingartner v. Charter Oak etc. Ins. Co.*, 32 Fed. Rep. 314; *Fry v. Charter Oak etc. Ins. Co.*, 31 Fed. Rep.

199; *Taylor v. Life Assn.*, 13 Fed. Rep. 493; *Rundel v. Life Assn.*, 10 Fed. Rep. 720. The last case cited goes so far as to hold that the effect is to make the receiver's powers over property coextensive with those of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law. This would support the first proposition: See, also, *Davis v. Life Assn.*, 11 Fed. Rep. 781; *Bockover v. Life Assn.*, 77 Va. 85. It may be said that these cases are distinguishable, inasmuch as the plaintiff's policy matured before the Indiana receiver was appointed; but we think his rights depend upon his status when the Indiana proceeding was begun, which was before his policy became due.

But it is claimed that this question might have been and was raised by way of defense to the original action, and that it is therefore *res adjudicata*. If it be conceded that he secured a judgment to which he was not entitled, it does not follow that he is entitled to have it satisfied from property which, under his own contract, cannot be subjected to it. The decision of this question was not necessarily involved in the principal case, though it is true that, had his action been defeated upon the ground herein stated, ²⁷⁶ or, for that matter, upon any other, it would have ended these proceedings.

In our opinion, the judgment of the learned circuit judge should be affirmed, and it is therefore so ordered.

The other justices concurred.

RECEIVERS—INSOLVENCY—ATTACHMENT.—As between a foreign receiver, assignee, or trustee and a resident attaching creditor, the latter is protected by the courts of his state: *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917. An assignment in insolvency made under the law of one state is not a bar to a subsequent attachment of the insolvent's property situated in another state by a citizen thereof, or of a third state: *Sturtevant v. Armsby Co.*, 66 N. H. 557, 49 Am. St. Rep. 627. But a member of a building and loan association does not become a creditor instead of a stockholder by giving notice of his intention to withdraw, but who does not withdraw before the association becomes insolvent: Monographic note to *Curtis v. Granite State Provident Assn.*, 61 Am. St. Rep. 30.

KAUMERER v. CITY ELECTRIC RAILWAY COMPANY.

[116 MICHIGAN, 306.]

NEGLIGENCE — DANGEROUS MACHINERY — UNSECURED CAR—INJURY TO CHILD.—If a railroad company leaves a platform-car, with no machinery or any brake about it, unblocked upon its track on a highway, in such condition that it may be moved by the united strength of several children, it is not guilty of negligence which will render the company liable to a trespassing child playing on or about the car.

Phillips & Jenks, for the appellant.

Muir & Smith and Avery Brothers & Walsh, for the appellee.

307 LONG, J. This action was commenced to recover damages for injuries sustained by plaintiff by one of defendant's cars, which, it is claimed, was negligently left by it on a side-track without being guarded, or brakes set, or other means employed to prevent children from moving it. On the trial, it appeared that the plaintiff was nearly seven years old when the accident upon which this action is founded happened—September, 17, 1895. Defendant operated a street railway in the city of Port Huron. The car which caused the injury was a small flat or platform car, and was about fourteen feet long by six feet wide, with a box about twelve feet long, having drop sides, and leaving one foot of platform at each end projecting beyond the box, the platform being about twenty-six inches from the ground. The weight of the car was from fifteen hundred to eighteen hundred pounds. It had four iron wheels, and had no brake upon it, or other means to prevent its being moved. On the afternoon of the accident, an order was received by the company ³⁰⁸ to go to Huronia Beach, a point about four miles north of the center of the city. The employes operating the combination of motor-car and flat-car decided to leave the platform-car at the point of the accident, while they proceeded with the motor-car alone to Huronia Beach to get some trunks and return, which would occupy from forty to forty-five minutes, and avoid the necessity of drawing the flat-car and making switches that would be necessary in order to reverse the position of the cars on the return trip. There is testimony that this car was in that place in the morning and noon, and that there were then no blocks or anything under or beside the wheels to prevent the car's being rolled; and the car was in the same place when witness came from school at night, about the

time of the accident. The place of the accident was the only point on the company's line where the platform-car could be left without interference with other cars, and it had been left in the same way and place a number of times before under similar circumstances. The conductor in charge of the cars on this occasion testified that, when the flat-car was left at this point on this occasion, he blocked the wheels with a stone and a stick, which could be removed, however, by the kick of a small boy, if he hit it right, and that he always blocked this car every time he left it there.

The plaintiff lived about the length of a block from the place where this car was left and, coming from school in the afternoon of September 17th, seeing children playing upon the car, came to the place of the accident. At that time there were eight or ten children playing with it, pushing the car a short distance west, and then returning it east. A part were pushing, the others riding. At this point there is a slight descent to the west, but not enough to start the car of itself, and there was much dust upon the track. At the time the plaintiff arrived, the children playing with the car were just starting or about to start it toward the west, and had run it up and down the track a number of times, and there were then no blocks under the wheels. She climbed upon the west end of the platform ^{box} to ride, and, without having got into the box, either slipped or was pushed in the play from the car, falling in front of the wheels, one of the wheels running over her leg, and causing the injuries complained of. The plaintiff had been told by her mother "not to go near the cars, that she was liable to be hurt"; but the danger was not explained to her, and she testified she did not think or know it was dangerous. She was not told not to go near the car on this day. This car had been left in the same position before, and children had played upon it, and pushed it, and street-car employes had taken the car from that position when the children were playing upon it, and the children had helped the street-car men shove the flat-car up to the motor-car for the purpose of connecting it. The plaintiff was injured almost immediately after going to the car. The children had been playing upon the car from three-quarters of an hour to an hour.

At the conclusion of the proofs, counsel for defendant requested the court to instruct the jury, among other matters, that, under the undisputed evidence, the defendant was entitled to a verdict. This was refused, and, inasmuch as this is

the only question discussed in appellant's brief, we need not state the other requests to charge. The court submitted two questions to the jury: 1. Whether the defendant was guilty of negligence; 2. Whether the plaintiff was guilty of contributory negligence.

Upon the first the court instructed the jury as follows: "If this car had been left there by the railway company at other times, and the street railway company knew of that fact, knew that children were in the habit of going there and playing with this car, and moving it up and down the track, and riding upon it, and with that knowledge left the car there, and left it unfastened and unblocked; and, in your opinion, taking all the surrounding facts and circumstances into consideration, you deem the use of that car in that manner by children dangerous to them, and that careful, cautious, and prudent men would not have left it there in that condition, you would be ~~so~~ justified in finding that the railway company was liable for the injury that this child suffered, provided that she has not been guilty of contributory negligence."

Upon the second question the court charged the jury, substantially, that they might take into consideration the age of the child, the means she had of knowing the danger, the judgment, intelligence, and reason of the child, and say whether, under all the circumstances of the case, she was capable of being guilty of contributory negligence; and, "if you feel that she was, and that any act of hers contributed to the injury, you should deny her claim; otherwise, if she did contribute to it, and you think that in her tender years, and in her judgment and reasoning powers, she was incapable of knowing any better, you would be justified in passing that over." Plaintiff recovered, and defendant brings error.

Plaintiff contends that, this car track being in a public highway, the child was not a trespasser, either in moving the car or in getting upon it. The plaintiff does not contend that the car was of itself an object dangerous to children, but that, the car being so light that children could move it on the track, it became a dangerous object in being moved along the track, and, being an attractive object, they were likely to move it, and thus be put in danger; that the defendant's employes knew, before leaving the car there on that occasion, that on former occasions children were attracted to it, had moved it along the track, and that such employes had countenanced the children in thus playing with it; that, with this evidence in the case,

the court very properly left the question to the jury to determine whether, taking all these matters and the surrounding circumstances into consideration, careful, cautious, and prudent men would have left the car there in that condition. In support of this contention counsel cite the turntable cases in note to 27 American and English Encyclopedia of Law, 344. It is said in that text: "The general rule of liability, as laid down by the supreme court of the United States and adopted by the ³¹¹ great majority of the state courts, is that if a railway company leaves a turntable or other like machinery upon its own property, likely to attract children, so unsecured that children may put it in motion, the company is negligent, and, if a child is injured thereby, will be liable in damages."

We are not called upon in the present case to express any opinion upon the questions decided by those cases. In Massachusetts and New Hampshire that ruling is not followed, it being held in those states that a railroad company is not liable for injuries sustained by a child while playing upon a turntable, either upon the ground of an implied invitation to come there, or of a duty on the part of the company to make the place safe: *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349, 26 Am. St. Rep. 253; *Frost v. Eastern Railroad*, 64 N. H. 220, 10 Am. St. Rep. 396. All the turntable cases are rested upon *Railroad Co. v. Stout*, 17 Wall. 657. In that case a child of six years was injured by playing upon the defendant's turntable. The turntable was unlocked and unguarded. The court charged the jury, upon the question of the defendant's negligence in the management or condition of the turntable, that: "To maintain the action, it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine—one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction, and the manner in which it was left, it was not dangerous in its nature, the defendant was not liable for negligence; that they were further to consider whether, situated as it was, as the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it were left unlocked or unguarded; that, if it did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The court, in passing upon and approving this charge, said: ³¹² "That the turntable was a dangerous machine, which would

be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he [plaintiff] had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, . . . when it was proved to the jury that several boys were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that defendant should have anticipated that such would be the case."

It is difficult to see how that case can be likened to the present. In that case a dangerous piece of machinery was left open, exposed, and unguarded, to the knowledge of the defendant. The turntable itself was dangerous.

In *Peters v. Bowman*, 115 Cal. 349, 56 Am. St. Rep. 106, the court said: "The rule of the turntable cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied."

Even in some of these turntable cases it is held that railroad cars are not dangerous machines, and attractive to children, within the meaning of those cases. *Elliott on Railroads*, section 1260, says that this is regarded as the true rule. In *Railroad Co. v. Stout*, 17 Wall. 657, the court charged the jury that: "If the turntable in question, in its construction and the manner in which it was left, was not dangerous in its nature, the defendant was not liable for negligence." The car in question in the present case was not dangerous in its construction. It was a plain car, with four wheels, with no machinery about it. It had no ²¹² brake, but was a small platform-car. It is true that it stood upon a track where it might be moved by several children applying their united strength. Several children might, in the same way, move a wagon or carriage left beside the highway. We apprehend that no claim of negligence could be sustained against the owner of such a vehicle

if one of the children climbing upon it should fall off and be run over, even if the wheels were left without blocking. In *Robinson v. Railway Co.*, 7 Utah, 493, it appeared that a hand-car had been left beside the track. Some boys had lifted it upon the track, and were running it back and forth, when plaintiff, being attracted by it, went there, and was injured by jumping or falling from it while in motion. The boys had used this car eight or ten times before, with the permission of the "boss," while the men were there at work; but he had never given them such permission while the men were not at work. This car weighed six or seven hundred pounds. It was held that the car was not a thing dangerous in itself, and that the company was not negligent in leaving it unlocked beside the track. In the present case, assuming that the defendant left the car without sufficient blocking, it must be held that plaintiff could not maintain this action, for the reason that there is nothing in the case showing or tending to show any negligence on the part of the defendant.

It is not necessary to determine whether the plaintiff was guilty of contributory negligence, or whether that question was properly left to the jury. Neither is it necessary to say that the plaintiff was a trespasser in going upon the track there, which was laid along the highway. It is proper, however, to say that she was a trespasser in any attempt to use this car. The defendant had just as much right to leave this car where it did as a farmer would have to leave his wagon or carriage upon his own side of the highway, and no one would have the right to move it, except upon the claim that it impeded public travel. The ³¹⁴ car being rightfully left where it was upon the track, and not being a thing dangerous in itself, the court should have directed the verdict in favor of the defendant.

Judgment below must be reversed. No new trial will be ordered.

The other justices concurred.

RAILROADS—REAL PROPERTY—NEGLIGENCE—DANGEROUS MACHINERY—TRESPASSING CHILDREN.—It is not the duty of a landowner to keep his property in such condition that persons, whether children or adults, going thereon without his invitation may not be injured: *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 68 Am. St. Rep. 858. Railroad cars and similar machinery are not "dangerous machines" within the meaning of the rule in what are known as the "turntable cases," and if a person, no matter what his age, is upon the track or yard of a railroad company without inducement or invitation, express or implied, for him to enter, and he is neither a passenger nor on his way to become one, but is

there for his amusement and using the track or yard as a playground. he is a mere intruder and trespasser, to whom the railway company owes no duty, except the negative one not maliciously, or with gross or reckless carelessness, to run over or injure him. Hence, in case of an accident, the company is not liable for injury to one so upon its property, unless it is guilty of gross negligence: Monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 421, on negligence in dealing with children.

PETZ v. VOIGT BREWERY COMPANY.

[116 MICHIGAN, 418.]

LANDLORD AND TENANT—REPAIRS.—A landlord, in the absence of covenants on his part, is not required to repair the demised premises, even when they become defective through deterioration or decay.

LANDLORD AND TENANT—DEFECTIVE PREMISES—LIABILITY FOR RENT.—Rent is payable even when demised premises have become untenable by inherent defect, provided they were habitable at the time of the demise, there being no fraud on the part of the landlord.

LANDLORD AND TENANT—LIABILITY FOR RENT WHILE REPAIRS ARE BEING MADE.—If leased premises become out of repair or dangerous and unfit for occupancy while the tenant is in possession, and there is no agreement in the lease that the lessors shall make repairs, the lessee is liable for rent while the lessor is making repairs with the lessee's consent, although he is excluded from the premises during such time, unless there is an agreement that rent should not continue during that time.

Keena & Lightner, for the appellant.

Wilkinson & Post, for the appellee.

⁴¹⁸ **LONG, J.** Plaintiff is the owner of the premises in question. Edward W. Voigt had been in the brewing business in Detroit for many years, when, in 1889, he organized the defendant corporation. In September, 1882, plaintiff leased the premises in question to Mr. Voigt personally, for the term of five years, "to be occupied for a ⁴¹⁹ restaurant and dwelling." The lessee covenanted that, during that term, he would "keep the said premises, and every part thereof, in as good repair, and, at the expiration of the term, yield and deliver up the same in like condition as when taken, reasonable use and wear thereof, and damage by the elements, excepted." There was the usual covenant for quiet possession on the part of the lessor, but there was no agreement by her to repair. On April 16, 1887, the parties to this lease executed a renewal lease for five

years after the expiration of the first one; i. e., until October 1, 1892. The covenants in this second lease were the same as those above quoted from the first one. February 12, 1891, this second lease having been surrendered for its unexpired term, a new lease was given to the defendant for a term of ten years from May, 1891; and this lease (being the one upon which this action is based) contained the same clauses as the two prior leases, as quoted above. The rental during the time covered by these leases varied from two thousand five hundred dollars per annum during the first years to four thousand dollars during the final years. From the time the lessee took possession of the premises, in 1882, until the trial of the cause, in 1897, Mr. Voigt (either for himself personally, or on behalf of the defendant) had the sole and exclusive possession of the whole of said premises, except during three months in 1896, when plaintiff was engaged in making repairs. Mr. Voigt furnished them for the tenants, as he desired, from time to time; and they were taken by the defendant from Mr. Voigt, under the new lease, in precisely the same condition as he had occupied and left them. Mr. Voigt made many changes in the building during his occupancy under the three leases.

In August, 1896, plaintiff received notice, through her brother, Joseph Pulte, who managed her business affairs, from the building inspectors, that the side wall of the building was in an unsafe condition, due to its bulging out at the first and second floors, and that it must be repaired. None of the parties interested in the building had noticed this defect before this time. Mr. Pulte saw ⁴²⁰ Mr. Voigt, and some conferences followed between them, resulting finally in an interview between Mr. Voigt and Mr. Lightner, on behalf of plaintiff, which was followed by certain correspondence. Plaintiff offered to make the needed repairs to the wall, but refused to allow anything off the rental during the time the repairs were being made. The keys were handed by defendant to plaintiff's attorneys on August 27, 1896, to make the repairs. On September 2d, Mr. Voigt spoke of not intending to pay rent while plaintiff was engaged in making repairs. At once plaintiff's attorneys returned the keys to Mr. Voigt, with the positive declaration that the repairing would be undertaken by plaintiff only on the understanding that all the rent would be paid by defendant under the lease. Defendant thereupon, acknowledging receipt of this letter, returned the keys to plaintiff's attorneys, and told them to go ahead with the repairs, and in-

closed check for the month's rent, which was then past due. The repairs were undertaken at once by plaintiff, and were done in a thorough manner, at an expense to plaintiff of about two thousand five hundred dollars. The building was inspected by defendant's architect, and was accepted by him about December 1st, he receiving the keys on behalf of defendant. The building inspectors examined the building in December, and gave a certificate that it was in good condition. Defendant, by Mr. Voigt, took possession of the building, and entered upon extensive improvements, to fit it for a German restaurant. While at this work, his men found it necessary to support certain joists with a truss, and to put in supports. This was not in the part of the building which plaintiff had repaired. Defendant did not notify plaintiff of these defects, nor call upon her to repair them, but Mr. Voigt had them attended to himself, and he paid for these latter repairs. This action was brought by plaintiff to recover five months' rental, under the lease, from September, 1896, to January, 1897, which defendant has refused to pay, and interest thereon. The jury returned a verdict for plaintiff for two months' rent; and ⁴²¹ the plaintiff, claiming that she is entitled to the five months' rental, asks this court to review the questions decided against her on the trial.

At the close of the testimony, the court submitted to the jury the following special questions: "1. Did the plaintiff take such control of the premises, to rebuild the wall and repair the building, as to exclude the defendant thereby from possession during the repairs? 2. Were the premises unfit to occupy during such rebuilding and repairs? 3. Were the defects that required curing by rebuilding the walls and under-piers made necessary by the uses or changes of the building during the time that these tenants had control? 4. Did the defendant, during its possession under this lease, remove any columns or partitions, and weaken the building, so as to cause the defects complained of that required repairs?"

Questions 1, 2, and 3 were answered by the jury in the affirmative, and question 4 in the negative, and verdict was rendered in favor of plaintiff for six hundred and eighty-five dollars, which was for two months' rent.

Plaintiff contends: 1. That she was not legally required to make the repairs, and that doing the work she did at defendant's request does not constitute an implied covenant that she would make the repairs, and is no excuse for refusal to pay

the rent stipulated; 2. That, admitting that plaintiff was bound to make the repairs, defendant must pay the rent stipulated in the lease, provided the repairs were made with reasonable speed and care, and that it is shown this was done; 3. That the repairs were made necessary by the improper use of the building by Mr. Voigt under the former leases; and that the defendant knew, through its agent, Mr. Voigt, the condition of the building, and the defendant cannot hold plaintiff liable for the conduct of Mr. Voigt, of which it had full knowledge; 4. That the repairs were made necessary by the improper use made of the premises by defendant under its lease—that is, in using them for other than for restaurant ⁴²³ and dwelling; and defendant must therefore pay rent; 5. It being admitted that five months' rental under the lease was not paid, and there being no evidence to sustain any of the items of counterclaim given in defendant's bill of particulars, the verdict should have been directed for plaintiff for her entire claim; 6. That defendant's measure of damages, if it were entitled to any setoff under the facts, was not the rental reserved in the lease, but the actual amount defendant was damaged by reason of the repairs being made; 7. That the burden was upon the defendant to prove its counterclaim, and to show the amount of its damage; 8. That, plaintiff having consented to make the repairs on condition that defendant would pay all the rent, by accepting this offer defendant estopped itself to refuse to pay the rent; 9. Since defendant did not notify plaintiff of the defects claimed to have been discovered elsewhere in the building in January, 1897, evidence of these alleged defects and repairs made by defendant was irrelevant.

We think the most of these contentions are answered by the jury under the general charge of the court. The court charged the jury substantially, after submitting the four special questions: "There is one other question, while I am upon the subject, I will speak of. It seems to be contended by counsel for the plaintiff, and as sharply denied by counsel for the defendant, that there was an agreement, just about the time they entered upon these repairs and the three hundred dollars was sent in for the August rent, whereby the brewing company should pay the rent, notwithstanding that they were to be out of the occupancy; and whether there was an agreement of that kind or not is a question for the jury. . . . Whether or not they came together, whether or not their minds met, or whether they agreed upon anything, you must gather from their dealings there together, and from their correspondence. . . .

If you find that the building was unfit for occupancy at the time the plaintiff was notified to rebuild the northeast wall, and the defendant, without any fault on its part, was deprived of the peaceable use of said building, plaintiff cannot recover rent for the use of the building during the period it was in an untenable condition."

⁴²³ In the verdict, none of the defendant's setoffs were allowed as such. The jury undoubtedly took the defendant's theory, that it was not liable for the rent of September, October, and November, the months during which the plaintiff was making the repairs, and during which time the defendant had no use of the building.

It appears from the testimony that in July, 1896, the board of building inspectors of Detroit inspected the building, and found it in a dangerous condition, and notified plaintiff's agent to "make safe the northeast corner, as this wall is bulged up to the second-story window, and is in bad shape"; that, in accordance with this notice, plaintiff, September 1, 1896, took possession of the building, to make the repairs, and found the wall in such bad condition that, instead of merely bracing it up, the entire easterly wall, for the height of two stories and sixty feet back, was taken out and rebuilt; that the westerly wall of the building had also sagged inwardly; that these repairs were going on until December 1st, when the defendant accepted it, and again commenced its occupancy. Testimony was also introduced by defendant tending to show that during these three months the building was untenable. Defendant also claimed that it should not be liable for rent for December and January; but, as the jury found for plaintiff for those months, that question need not be discussed.

The only questions, then, remaining are: 1. Whether the court was in error in submitting to the jury the question whether the building was unfit for occupancy during September, October, and November, 1896, and instructing them that if they found it was, and the defendant was thereby deprived of its peaceable use, the plaintiff could not recover the rent during the time it was in an untenable condition; 2. Whether the court was in error in submitting the question whether there was an agreement between the parties that, if the plaintiff undertook the repairs, the defendant would pay rent during the time the building was being repaired, and instructing them that, if they found such an agreement, the defendant would be liable for the rent for those months.

⁴²⁴ We think there was evidence in the case which warranted this last charge, if such charge was at all important. But, in view of the fact that defendant did not introduce testimony tending to show an agreement upon the part of plaintiff that it should not pay rent during these months, we think the court in error in submitting the first proposition. The jury found, specially, that the plaintiff took such control of the building to make these repairs as to exclude the defendant from possession. But it is well settled that the landlord, in the absence of covenants on his part, is not required to repair, even when the premises become defective by reason of deterioration or decay: *Fisher v. Thirkell*, 21 Mich. 22, 4 Am. Rep. 422; *Gott v. Gandy*, 2 El. & B. 845. Rent is payable even when demised premises have become untenable by inherent defect, provided they were habitable at the time of the demise, and there being no fraud on the part of the landlord: *Wood on Landlord and Tenant*, sec. 382; 12 Am. & Eng. Ency. of Law, 722, and cases there cited.

In the present case, it appeared that Mr. Voigt, defendant's agent, had occupied these premises for many years before the lease to defendant was made. Mr. Voigt was the agent of defendant, and made the arrangement for the defendant's term. If the premises were then out of repair, he had as much knowledge of it as the plaintiff. This lease was executed in February, 1891, and defendant went into possession under it, and continued in until July, 1896, before the building inspectors of the city gave the notice to repair to make the building safe. It became out of repair or became dangerous and unfit for occupancy while the defendant was in. There being no agreement in the lease that the lessor should make repairs, the lessee would be liable for rent even if the lessor did make them, unless there was an agreement that rent should not continue during that time. The court should have directed verdict in favor of the plaintiff for the whole amount claimed (that is, for the five months' rent), as there is no pretense that the plaintiff agreed to relieve the defendant ⁴²⁵ from such payment. The defendant relies upon the untenable condition of the premises, and its exclusion during the time repairs were being made, and not upon an express contract that it should not pay rent during this time. The case is not like *Leonard v. Armstrong*, 73 Mich. 577. There the unhealthy condition of the premises existed when the tenant entered. In the present case, the jury found that the defects which required the rebuilding of the

wall, et cetera, were made necessary by the uses and changes of the building during the time Mr. Voigt and the defendant had control. The defendant was represented solely by Mr. Voigt, who had the entire and complete control of the business, and made the arrangements under which defendant entered. Clearly, the entry of the plaintiff, with defendant's consent, to make these repairs, under these circumstances, was not an eviction from the premises, and the case does not fall within that class of cases cited by defendant's counsel.

The judgment must be reversed and a new trial ordered.

The other justices concurred.

LANDLORD AND TENANT—REPAIRS.—A landlord is under no duty to repair leased premises unless he has covenanted to do so, and his promise to make repairs thereon is without consideration, and no action can be sustained because of his nonperformance: *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466; *Ward v. Fagin*, 101 Mo. 669, 20 Am. St. Rep. 650.

LANDLORD AND TENANT—DEFECTIVE PREMISES.—In a lease of a building there is no implied warranty that it is safe, suitable for habitation, or properly adapted to the uses to which it was applied, nor that it shall continue fit for the purposes for which it is demised: *Note to Blake v. Dick*, 48 Am. St. Rep. 676; extended note to *Minneapolis etc. Co. v. Williamson*, 38 Am. St. Rep. 477.

LANDLORD AND TENANT—LIABILITY FOR RENT.—Nothing but a surrender, a release, or an eviction can in whole or in part release a tenant from the obligation to pay rent: *Fisher v. Milliken*, 8 Pa. St. 111, 49 Am. Dec. 497. A tenant is exonerated from liability to pay rent by any interference by the landlord which deprives the tenant of the right of enjoyment of the premises to the full extent guaranteed by the lease: *Crommelin v. Thless*, 31 Ala. 412, 70 Am. Dec. 499.

FOWLES v. BRIGGS.

[116 MICHIGAN, 425.]

NEGLIGENCE—PROXIMATE CAUSE.—A shipper of lumber who negligently loads a car is not liable to a railway brakeman who is injured by the shifting of the lumber, when the accident happens after it has become the duty of the railway company to provide for the inspection of the car. In such case, there is the intervention of an independent human agency between the shipper's negligence and the accident, which renders such negligence a remote and not a proximate cause.

G. W. Weadock and J. F. O'Keefe, for the appellant.

Hanchett & Hanchett, for the appellees.

⁴²⁶ MONTGOMERY, J. Alexander T. Fowles, plaintiff's intestate, on the fourth day of February, 1896, was an employé of the Flint & Pere Marquette Railroad Company. His employment was that of rear brakeman on a freight train. The defendants, lumber dealers, loaded a flat-car with lumber, in their yard in the city of Saginaw, and shipped it over the Flint & Pere Marquette Railroad Company, to Toledo, Ohio. The lumber was maple, eleven thousand feet, weighing about thirty-three thousand pounds, and piled flat upon the car in two tiers parallel with the sides of the car. It was put upon this flat-car by the defendants three days before the day of the accident. The testimony of the plaintiff tended to show that the railroad crew, of whom the deceased was rear brakeman, were ordered by the railroad company, on the morning of the 4th of February, to make up some freight trains for transportation; and, in the line of their duty, this carload of lumber was shunted at a rate not to exceed from three to five miles an hour upon a level track toward a box-car. The deceased was upon the ground, and stepped in between the box-car and the carload of lumber for the purpose of coupling the two; and, when the car of lumber came in contact with the box-car, the lumber shifted twenty-five inches upon the surface of the flat-car, and crushed to death the deceased, by pinning him against the end of the box-car. .

The plaintiff's declaration declares the several acts of negligence of the defendants to be: ⁴²⁷ 1. That they carelessly and recklessly loaded said flat-car of said railroad company so as to cause the death of the deceased by the shifting of the lumber while upon said car; that said lumber was so loaded upon said car that it was not safe for an employé of said railroad company to couple it to another car, and that said danger was not apparent to the deceased; 2. That it was the duty of said defendants not to ship maple lumber upon a flat-car without having the lumber so fastened and staked as to hold it from shifting; 3. That a piece of timber or other material should have been placed crosswise upon the floor and near the ends of said flat-car, under the lumber, for the purpose of elevating the extreme ends of the lumber; 4. That the defendants loaded this lumber upon the deck of said car while the deck was covered with ice and snow and sleet, and in a slippery condition; 5. That the lumber was covered with ice and snow and sleet, and in a slippery condition; 6. That the lumber should have been placed in a box-car, and not upon a flat-car.

The cause was tried before a jury, and, after the proofs were all in, the trial judge said to the jury that "the evidence fails to show that the defendants violated any legal duty that they owed the deceased. Consequently, there is no question of fact to be submitted to you for your consideration. Your verdict, therefore, will be in favor of the defendants of no cause of action."

The deceased had no contract relations with the defendants, and, if his representative has a right of action based upon defendants' negligence, it must rest upon a duty owed to deceased in common with all other employes of the Flint & Pere Marquette Railroad Company, or other road over which the car in question might ultimately be shipped; in short, a breach of a duty owing to the public. An accurate statement of this duty is: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence": Wharton on Negligence, sec. 437.

⁴²⁸ Yet, as stated by the same author, the confidence must be immediate, or the action fails. In other words, there must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of an independent human agency: Wharton on Negligence, sec. 438. In the present case the defendants owed the railroad company the duty of using ordinary care in loading the car in question; but, before the car came to decedent, it was the duty of the railroad company to provide for the inspection. Here was the intervention of an independent human agency. A leading case is *Winterbottom v. Wright*, 10 Mees. & W. 109, in which case it was held that the defendant, who had contracted with the postmaster general to provide a mail coach, and keep it in repair, was not liable to an employe of one Atkinson, who had contracted with the postmaster general to provide horses and coachmen for the purpose of carrying the mail: See, also, *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253; 63 Fed. Rep. 400; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333. In *Necker v. Harvey*, 49 Mich. 519, the leading cases on this point are cited with approval by Mr. Justice Cooley.

Plaintiff seeks to bring this case within a line of cases cited creating an apparent exception to the rule stated; but we think these cases may be all classed as coming under one of three heads: 1. As in *Johnson v. Spear*, 76 Mich. 139, 15 Am. St. Rep. 298, where the fault was not keeping defendant's premises in a suitable and safe condition; or 2. As in *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, where the defendant reserves the right to direct the manner of work, or undertakes to supply the instrumentalities. Of this class is also *Elliott v. Hall*, 15 Q. B. Div. 315, relied upon by plaintiff, in which case it was said by the court that "the defendant had entire dominion over the truck" which caused the injury—a fact which distinguishes the case from the present. Cases belonging ⁴²⁰ to a third class, more closely analogous to the case under consideration, have arisen where the shipper of a dangerous substance, the character of which is not made known to the carrier, has been held liable. But liability in this class of cases has been limited to instruments and articles in their nature calculated to do injury: *Davidson v. Nichols*, 11 Allen, 514. We think the case of *Chapman v. Atlantic Refining Co.*, 38 Hun, 637, 108 N. Y. 638, which counsel for plaintiff cite as fully sustaining their contention, is clearly distinguishable from the present case. The statement of facts in that case is found in *New York etc. R. R. Co. v. Atlantic Refining Co.*, 129 N. Y. 598, from which it appears that the defendant corporation was engaged in constructing some oil tanks on the line of the New York, Lake Erie & Western Railroad Company, at a place called Dykes' Switch. The employes of defendant left a car of lumber, after it had been delivered to defendant, and partly unloaded, in such unsafe condition that a portion of the lumber fell upon or was blown upon the track of the railroad company, causing the derailment of the engine operated by the plaintiff, Chapman. It will be seen that the defendant had complete control over the partly unloaded car, and whatever duty was owing was owing by defendant. In the present case, the defendants had parted with the control of the car. The railroad company owed the duty to decedent of causing an inspection or of providing a rule for inspection.

We think the circuit judge was right in his holding. Judgment affirmed.

The other justices concurred.

NEGLIGENCE—PROXIMATE CAUSE.—A responsible agent, intervening between the original negligence and the injury, cuts off the line of causation, and relieves the originally negligent party from liability: *McGahan v. Indianapolis etc. Gas Co.*, 140 Ind. 335, 49 Am. St. Rep. 199. The mere fact that the intervention of a responsible human being can be traced between the defendant's wrongful act and the injury complained of will not absolve him. The intervention must be of such a character that without its having occurred the injury complained of would, in all likelihood, not have happened: Monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 841, discussing the entire question. See, also, *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616, 53 Am. St. Rep. 611.

WEBB v. DETROIT BOARD OF HEALTH.

[116 MICHIGAN, 516.]

MUNICIPAL CORPORATIONS—RIGHT TO QUARANTINE AND DISINFECT PREMISES—LIABILITY FOR COMPENSATION.—Neither a city nor its officers are liable for losses caused by quarantining and disinfecting premises infected with smallpox, if the only use made of such premises is such as is necessary for the proper care of infected patients found therein.

J. J. Speed, for the relator.

A. Webster and C. D. Joslyn, for the respondent.

⁵¹⁶ LONG, J. On July 23, 1897, relator filed a petition in the Wayne circuit court, praying for a writ of mandamus against the respondent to compel it to allow her bill for losses occasioned by smallpox infection. The bill was for amount due her "for loss and for compensation ⁵¹⁷ by reason of the infection of the premises No. 33 Baltimore avenue west, in the summer of 1894, by smallpox: Cost of renovation, et cetera, after disinfection, \$107; loss of rent, \$80; furniture, bedding, and other articles destroyed, \$40; total, \$227."

An issue having been made upon the petition and answer, the same came on for hearing before the court and a jury. At the conclusion of the testimony, the court denied the writ, without taking the verdict of the jury upon the questions of fact. The court said: "It is obvious that where the city takes property as a smallpox hospital, or where the property of another has become infected by the act of the city or any of its agents, the city would be liable to respond for the value of such property. The case at bar, however, presents no such question. Mrs. Brown, the tenant of relator, had a case of smallpox in her

house, and subsequently a second case broke out. Whatever infection came to the premises or the property therein came in consequence of these cases of smallpox and without any fault on the part of the board of health, and not as the result in any way of their action. The property had become infected even before any action was taken on their part. It does not appear from the evidence that any measures they took to disinfect the premises injured the property which relator afterward destroyed, and for which relator seeks compensation. A suggestion has been made that she is entitled to receive compensation on account of the moving back, after the removal, of the first patient. But it will be remembered that Mrs. Webb was not in possession of the property, but that she had leased the premises to Mrs. Brown; and, if any right exists against the board of health, it does not belong to relator. For this reason a mandamus must be denied." The case comes into this court by writ of certiorari. The testimony is all returned in this record.

We are satisfied that the court below was correct. The smallpox broke out through no fault of the health board. As soon as the first case in this house was reported, the ⁵¹⁰ patient was removed by the health board to the hospital, and the house quarantined. It was quarantined nearly two weeks, when the second case broke out. This patient was not removed to the hospital, but the house was continued to be quarantined by the board. During all this time it was rented to Mrs. Brown, who continued to live there, and who, the relator testified, paid the rent until the middle of June, and then, because of the smallpox, was not able to pay more rent. But we think no claim can be made for the rent of the house under the circumstances here shown, as the question is ruled by *Farnsworth v. Supervisors of Kalkaska Co.*, 56 Mich. 640. The house was infected before it was quarantined. The proofs show that the goods, after being disinfected, were destroyed by the relator or under her directions, and not by the respondent. She destroyed them, not because they were injured by disinfection, but because they had been infected with the disease. *Safford v. Detroit Board of Health*, 110 Mich. 81, 64 Am. St. Rep. 332, has no bearing upon this case. The board did not make a hospital of relator's house, or make any further use of her goods than was necessary to the proper care of the patients who were there found suffering from the disease. It was the duty of the respondent to quarantine the relator's house, and, for the protection of the public, to dis-

infect the property. The municipality is not liable for injury to property resulting from the performance of this duty by its officers. If the officers have done their work negligently, and thereby caused unnecessary damage, such officers, not the municipality, are liable, if any one is: *Shipman v. State etc. Sanitary Commission*, 115 Mich. 488.

The order of the court below is affirmed.

The other justices concurred.

MUNICIPAL CORPORATIONS—SANITARY REGULATIONS—LIABILITY.—Municipal corporations are not liable for the negligence of its officers or agents in executing sanitary regulations adopted for the purpose of preventing the spread of contagious disease: *Wyatt v. Rome*, 105 Ga. 312, 70 Am. St. Rep. 41. In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the promotion of the public health, it is in the performance of governmental functions, and its officers are not agents for whose action or inaction it is answerable. Health officers acting within the limits of their authority are not liable for the consequences of a mistake of judgment when proceeding with good faith and with reasonable caution: *Monographie note to Hurst v. Warner*, 47 Am. St. Rep. 548.

HAMMOND v. PLACE.

[116 MICHIGAN, 628.]

BONDS—MUNICIPAL—COMPELLING PAYMENT OF.—An owner, who obtains judgment against a city on municipal bonds valid when issued, is entitled to recover the amount of such judgment from the city, although the payment of such bonds might have been compelled by mandamus as they fell due.

MUNICIPAL CORPORATIONS—VALID CONTRACTS OF TAXATION TO PAY.—The validity of a contract made by a municipal corporation necessarily involves the right to raise by taxation the amount which it has agreed to pay, and in such case the poverty of the city is no defense.

MUNICIPAL CORPORATIONS—BONDS OF—JUDGMENT AGAINST—TAXATION TO PAY—MANDAMUS.—Under a statute providing that judgments against municipalities shall be assessed upon their taxable property, and the amount thereof added to the other municipal taxes, mandamus will lie to compel the levy of an assessment to pay a judgment against a city on its municipal bonds, valid when issued, although the rate of taxation is thereby increased beyond the limit fixed by the city charter.

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS. The legislature has no constitutional power to limit the taxing power of a municipality so as to prevent it from raising the amount necessary to pay its pre-existing valid obligations.

Mandamus by H. B. Hammond to compel C. S. Place, assessor of the city of North Muskegon, Michigan, to assess against

the taxable property of the city an amount sufficient to pay a judgment recovered by the relator on municipal bonds held by him. From an order granting the writ the respondent brings a writ of certiorari.

H. L. Delano, for the relators.

P. W. Niskern, city attorney, and G. S. Lovelace, for the respondent.

⁶³⁰ GRANT, C. J. 1. No claim is made that these bonds were not valid when issued. Counsel insist that the sole remedy possessed by the persons holding them was by mandamus to compel an assessment as they became due. If this were a defense, it should have been raised in that suit. The position, however, is untenable. Even if an amount sufficient to pay them had been included in prior assessments, and had failed of collection, or had been collected and misappropriated, this would not bar the right of the holders to sue upon their bonds: *Ralls County Court v. United States*, 105 U. S. 733.

2. Is it a good defense that the result of this assessment will increase taxation beyond the rate allowed by the charter? The charter of the respondent has been several times amended and revised. It has always contained a limit to the rate of taxation. The charter of 1895, at present in force, limits the amount that may be raised by general taxation "for the purpose of defraying the general expenses and liabilities of the corporation, and for all purposes for which the several general sums hereinbefore mentioned are constituted," to three per cent on the assessed valuation: Act No. 466, Local Acts 1895, c. 10, sec. 4. The general sums before mentioned are the contingent fund, the sinking fund, to pay the bonded indebtedness of the city and interest thereon, the fire department fund, water fund, highway fund, poor fund, and police fund.

The validity of these bonds is conceded. When they were issued does not appear. It is fair to presume that they were issued when the city was prosperous, and had prospects of permanent prosperity. It depended largely ⁶³¹ upon its sawmills and perhaps other manufactories. They have removed to a very large extent, and property has depreciated. Poverty, however, is no more a defense against just debts in a municipal corporation than in any other corporation or an individual. The validity of a contract made by a municipal corporation necessarily involves the right to raise by taxation the amount which it has agreed to pay. "The right to contract must be limited by

the right to tax, and if, in the given case, no tax can be lawfully levied to pay the debt, the contract is void for want of authority to make it": *Citizens' etc. Loan Assn. v. Topeka*, 20 Wall. 655. The contract in this case being conceded to be valid, it follows that the only method by which it can be paid, viz., by taxation, is open to the payee. Taxation is the sole method provided by law for the payment of such debts. Execution cannot issue against the municipality. The proceeding by the writ of mandamus to compel payment of the judgment, or of the bonds without a judgment, is in the nature of an execution, and the only remedy open to the creditor. Creditors of a municipal corporation are, of course, chargeable with notice that any limitation to taxation controls, and cannot be exceeded. It is therefore held that, where the power to provide for the payment of bonds is limited to an annual special tax of one-twentieth of one per cent by the statute itself authorizing the issue of the bonds, a levy of taxes beyond that amount cannot be authorized: *State ex rel. Watkins v. Macon County Court*, 68 Mo. 29; *United States v. County of Macon*, 99 U. S. 582. So the constitutional limitations as to rate of taxation must control: *Grand Island etc. Ry. Co. v. Baker*, 6 Wyo. 369, 71 Am. St. Rep. 926; *Sherman v. Smith*, 12 Tex. Civ. App. 580. Our constitution imposes upon municipalities no limitation to taxation, but leaves that power in the legislature. So, also, where the law provided that "the aggregate of all taxes levied or ordered by any corporation shall not exceed sixteen mills," it was held that the assessor would not be compelled by the writ ⁶³² of mandamus to enforce a tax levied in excess of that amount: *State ex rel. Cincinnati v. Humphreys*, 25 Ohio St. 520; *East St. Louis v. Board of Trustees*, 6 Ill. App. 130. Our own court holds the same doctrine: *Ironwood Waterworks Co. v. Ironwood*, 99 Mich. 454.

None of these cases, however, involve the enforcement of the payment of bonds valid when issued, and merged in judgments. The contention means this, that the municipality may avoid its legal obligations by the reduction of its valuation, and making its running expenses equal to the limit of taxation. This is practical repudiation. Whether the valuation of the property of this city at thirty-three thousand dollars was reached by the same methods as were severely condemned by this court, speaking through Justice Cooley, in *Wattles v. Lapeer*, 40 Mich. 624, we do not know, since there is no explanation in the record. Whether, however, this singular result

would follow from a strict construction of the limitation clause in its charter we need not determine. Possibly, in contemplation of such results, a special statute was enacted, providing for the assessment of judgments rendered against municipalities: 3 Howell's Statutes, sec. 8218. This statute provides that judgments rendered against municipalities shall be assessed by the assessing officers upon its taxable property, and the amount thereof added to the other municipal taxes. It was enforced in *Shippy v. Mason*, 90 Mich. 45. It clearly provides for the payment of judgments, exclusive of the limitations to taxation established by municipal charters.

It is, however, seriously urged that the above act is repealed, so far as the city of North Muskegon is concerned, by an amendment to its charter passed in 1897. It was there provided that, when the city shall be unable to meet the payment of any judgment or decree by reason of the limitation of its power of taxation, it shall be lawful for the council to issue bonds to pay the same, which shall not be disposed of at less than par value: Act No. ~~633~~ 354, Local Acts 1897, c. 11, sec. 9. Under the state of facts set up in the answer of the respondent, the issue of bonds to meet this and the other judgments against the city would be useless. They could not be sold at any price. This amendment, however, does not attempt to repeal the general statute, but only makes it lawful for the common council to meet the payment in another way. The general statute remains in full force. If the legislature had passed an act designed to aid the municipality in avoiding its legal obligations, courts would not hesitate to declare it inoperative and void, as impairing the obligation of contracts. Mr. Justice Cooley thus forcibly states the doctrine: "It is possible, however, that the state itself may so far sympathize with a debtor municipality as to be disposed to aid it in its obstructive methods to prevent collection; and it may seek to do this by so limiting the municipal power to tax that it shall be impossible for it to pay its debts by taxes raised within the legal limit. Where such obstruction has been attempted, however, it has been judicially determined that the limitation of the power to tax under such circumstances was an impairment of the obligation of contracts, and therefore inoperative. The argument, shortly stated, is that the state, in conferring upon its municipalities the power to contract debts and to levy taxes for their satisfaction, impliedly contracts with those who become creditors in reliance upon the power that such power shall not, while their

demands remain unpaid, be so limited, impaired, or hampered as to preclude the municipality providing for and satisfying such demands according to their terms. Any subsequent legislation, therefore, which could have such injurious effect upon the interests of creditors, and deprive them of the resource of taxation, which they had a constitutional right to rely on, will be treated as inoperative and void, and a levy of taxes may be compelled, as it might have been if no such legislation had been attempted": *Cooley on Taxation*, 2d ed., 76.

It follows that the judgment of the court below was correct, and it is affirmed.

The other justices concurred.

MUNICIPAL CORPORATIONS—VALID DEBT—LIABILITY—TAXATION.—The levy by the council of a municipal corporation of a tax for the payment of just debts, at a rate not exceeding the maximum limit of its power of taxation, is not discretionary, so that they may refuse to levy such tax for the payment of a judgment duly rendered, upon which execution has been issued and returned nulla bona, but it is a duty the discharge of which may be enforced by mandamus: *Coy v. Lyons*, 17 Iowa, 1, 85 Am. Dec. 539.

MUNICIPAL INDEBTEDNESS—LIMIT—JUDGMENT.—Obtaining a judgment against a municipality is not the creation of a debt against it within the meaning of a constitutional provision fixing a limit to the indebtedness which the municipality may incur: *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224.

MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS—TAXATION TO PAY DEBT—MANDAMUS.—Where statutes have been passed abrogating or restricting the power of taxation delegated to a municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, a party interested may, by mandamus, compel the exercise of that power as if no legislation had ever been attempted: *Broadfoot v. Fayetteville*, 124 N. C. 478, 70 Am. St. Rep. 610. If, at the time of the city's contract, its power to tax was unlimited, such power continues as to said contract, though a subsequent statute limits its power of taxation: Note to *Coy v. Lyons*, 85 Am. Dec. 545; extended note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 241.

LEGISLATURE—POWER TO TAX—IMPAIRMENT OF CONTRACTS.—The legislative power of taxation is subject to the qualification that it must not be exercised to impair the obligation of contracts: *Broadfoot v. Fayetteville*, 124 N. C. 478, 70 Am. St. Rep. 610.

HUBBARD v. SHEPARD.

[117 MICHIGAN, 25.]

ESTOPPEL—DOCTRINE OF—BASIS.—The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which, by his own conduct, he has induced another to believe do not exist.

EJECTMENT—DEFENSE OF TITLE IN THIRD PERSON—ESTOPPEL.—In ejectment, a defendant, holding under a land contract made by plaintiff and conditioned that defendant should pay all taxes upon the land, is estopped to set up title in a third party acquired at a tax sale upon defendant's default in the payment of taxes.

EJECTMENT—ESTOPPEL—TITLE IN THIRD PERSON—HUSBAND AND WIFE.—The estoppel of a defendant in ejectment to set up title in a third party obtained through the default of the defendant in performing the conditions of her land contract with the plaintiff, under which she holds, is binding with equal force upon her husband, joined with her as codefendant, whose possession is in the right of his wife.

A. D. Cruickshank, for the appellants.

J. M. Harris, for the appellee.

²⁶ MONTGOMERY, J. This is an action of ejectment. On the trial the plaintiff showed title derived from the United States, and showed in addition that the defendants held possession under a land contract made by plaintiff to defendant Fannie J. Shepard, who is the wife of her codefendant, that the defendants are long in arrears on this contract, and that the plaintiff had given them notice to quit. This contract bore date of February 19, 1889, and contained an agreement by Mrs. Shepard to pay all taxes then unpaid or thereafter assessed. Defendants offered to show that one Kimbark had acquired a title to the premises on a sale of the lands for taxes for the years 1889, 1890, and 1891, and defendant Elisha H. Shepard testified that he had recognized the right of Kimbark. There was, however, no surrender of possession to Kimbark by Mrs. Shepard, and no actual possession taken by Kimbark. The circuit judge ruled out the evidence of the Kimbark title, and directed a verdict for the plaintiff, and defendants bring error. The only questions presented by brief of defendants' counsel, and therefore the only ones we need discuss, are: 1. Whether, in this action of ejectment, Mrs. Shepard is estopped from showing title in Kimbark; and 2. If she is, whether the estoppel applies as well to the defendant Elisha H. Shepard.

Defendants' counsel admits that the general rule is that a tenant or contract purchaser cannot dispute his landlord's title, but insists that this rule of estoppel is limited to cases which involve possession merely, and that where the title in fee is claimed, as in ejectment, the tenant may show that the plaintiff has no greater right than that of possession. Counsel cites *Jochen v. Tibbells*, 50 Mich. 33, and *Shaw v. Hill*, 83 Mich. 324, 21 Am. St. Rep. 607. These cases deal with an estoppel arising from the relation of landlord and tenant, or purchaser and vendor, and sustain the defendants' view, that the limit of an estoppel arising from such relations alone is as claimed by defendant's counsel in this case; but counsel seems not to have discriminated between an estoppel arising out of that ²⁷ relation simply, and such an estoppel as, in our judgment, should be held to exist in this case. The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe do not exist. While there are cases in which an application of this rule works a seeming hardship, and while for this reason the courts are careful to see that all the elements of estoppel exist in a given case, there can be no occasion for hesitancy in applying the doctrine where one attempts to set up a title which can only have an existence because of his own default. In this case it was the duty of defendants to pay the taxes for the years 1889, 1890, and 1891; and yet they attempt here to assert that they did not do so, and that, therefore, a third party has acquired title through their default, which they now seek to assert to defeat plaintiff's title. The circuit judge was right in holding that Mrs. Shepard could not do this: *Dubois v. Campau*, 24 Mich. 360, and cases cited in note to annotated edition. Nor do we think that Elisha H. Shepard is in any better position in this respect than his wife: *Ward v. Nestell*, 113 Mich. 185. His possession was in the right of his wife, and there is no showing that Mrs. Shepard ever yielded her right of possession to him.

Judgment affirmed, with costs.

The other justices concurred.

ESTOPPEL—BASIS.—The acts and admissions of a party may estop him from even speaking the truth, when in good conscience and honest dealing he ought not to be permitted to gainsay them: *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577. See, also, *Sweeney v. Pratt*, 70 Conn. 274, 66 Am. St. Rep. 101.

EJECTMENT—DEFENSE OF TITLE IN THIRD PERSON.—A defendant cannot set up an outstanding title in a stranger, when

sued for lands by the owner of a title under which the defendant claimed when he entered into possession: *Bank of Utica v. Mercereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189. In ejectment, a defendant may show title out of the plaintiffs, though he does not connect himself with it, if he did not enter under them: *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299.

BANDFIELD v. BANDFIELD.

[117 MICHIGAN, 80.]

HUSBAND AND WIFE—ACTIONS BETWEEN—PERSONAL TORT.—In the absence of an enabling statute, a wife cannot maintain suit against her husband for a personal tort committed upon her during coverture.

STATUTES—INTERPRETATION—ABROGATION OF COMMON-LAW RULES.—Courts will not extend a statute by implication in order to effect the abrogation of plain and long-established rules of the common law.

Case by Emma S. Bandfield against Charles A. Bandfield, her divorced husband, for personal injuries during coverture, the alleged injury being the communication to her by him of a loathsome and incurable venereal disease.

R. A. and W. E. Hawley, for the appellant.

F. C. Miller, for the appellee.

⁸¹ GRANT, C. J. The sole question is: Can a wife maintain suit against her husband for a personal tort, committed upon her while they were living together as husband and wife? We answered this question in the negative in the case of *Wagner v. Wayne* Circuit Judge, decided November 17, 1897. In that case the husband had uttered a gross libel against his wife. She brought suit by *capias ad respondendum*, and the proceedings were quashed by the circuit judge, for the reason that the wife could not maintain the suit against her husband. The wife applied to this court for the writ of *mandamus* to compel the circuit judge to vacate that order. The writ was denied, and the order of the circuit judge sustained. No opinion was written. But the sole and identical question there involved ⁸² is the same as is involved in this suit. The briefs there filed pursued the same line of argument and cited the same authorities as are now cited. Counsel cite the married woman's act of this state as conferring this right. This act is found in 2 Howell's Statutes, sections 6295, 6297, which read as follows: "The real and

personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterward become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female.

. . . . Actions may be brought by and against a married woman in relation to her sole property in the same manner as if she were unmarried."

In many decisions the courts of many of the states, notwithstanding the statutes conferring rights upon a married woman over her separate property not possessed at the common law, have thus far, without exception, denied the right of a wife to sue her husband for personal wrongs committed during coverture. No such right is conferred by our statute unless it be by implication. The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations. The rule is thus stated in 9 Bacon's Abridgment, title "Statute," I (4), 245: "In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the act expressly declares. Therefore, in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had had that design, they would have expressed it in the act."

The result of plaintiff's contention would be another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong—suits which the common law has refused ^{ss} on the ground of public policy. This court has gone no further than to support the wife, under the married woman's act, in protecting her in the management and control of her property. It has sustained her right to an action for assault and battery, for slander, and for alienation of her husband's affections against others than her husband: *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Rice v. Rice*, 104 Mich. 371. At the same time, it has held that the wife could not enter into a partnership or other business with her husband, and thus become responsible for the contracts and debts of her husband: *Artman v. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572; *Edwards v. McEnhill*, 51 Mich. 160. Personal wrongs inflicted upon her give her the right to a decree of separation or divorce from her husband,

and our statutes have given the court of chancery exclusive jurisdiction over that subject. This court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband, so far as courts can do justice, and, in providing for her, will give her such amount of her husband's property as the circumstances of both will justify, and, in so doing, may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor: 2 Am. & Eng. Ency. of Law, 2d ed., 120; 2 Howell's Statutes, sec. 6245. In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the contrary. We cite a few sustaining the rule: *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Freethy v. Freethy*, 42 Barb. 641; *Peters v. Peters*, 42 Iowa, 182; *Schultz v. Schultz*, 89 N. Y. 644; *Cooley on Torts*, 228; *Schouler on Domestic Relations*, sec. 52; *Newell on Defamation*, 366; *Townshend on Slander and Libel*, sec. 300.

Judgment affirmed.

The other justices concurred.

HUSBAND AND WIFE—ACTIONS BETWEEN—ASSAULT.—A wife cannot, after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture: *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27. Limitation as to the kind of actions that may be maintained by a wife when they are against her husband does not exist in California: *Wilson v. Wilson*, 86 Cal. 447, 95 Am. Dec. 194. At common law, it was necessary for the husband and wife to join in an action for an injury to her person or character, so far as the damage to the wife affected her individuality, and this is still the rule where statute has not changed it: *Extended note to Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 621.

STATUTES—ABROGATION OF COMMON LAW.—A change in the rule of the common law is not presumed from the enactment of a statute upon the same subject, unless the statute is explicit and clear in that direction: *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423; *Tinsman v. Belvidere etc. R. R. Co.*, 26 N. J. L. 143, 69 Am. Dec. 565.

LILLIBRIDGE v. McCANN.

[117 MICHIGAN, 84.]

NEGLIGENCE—FIRE CAUSED BY—QUESTION FOR JURY.—Where, in an action for damage by fire communicated to plaintiff's premises from defendant's it is alleged that the fire was started through defendant's negligence, and it is shown that he, previous to the fire, went into his barn, lighted his pipe and lay down to smoke in the midst of combustible materials, that he fell into a doze and his pipe into the combustible material, that a fire was started which was communicated to and destroyed plaintiff's property, this evidence is such as to require the submission of the question of the origin of the fire to the jury, and will support their finding that the fire was ignited by the pipe.

NEGLIGENCE—DEFENSE OF DAMAGE TO DEFENDANT. In an action for damage resulting from defendant's negligence, in the absence of intervening cause, the fact that the defendant may have suffered a loss of his own property through the negligent act complained of does not render him any less liable to the plaintiff for a loss ensuing to him through the neglect.

NEGLIGENCE—STARTING OF FIRES.—The owner of one building taking fire from another, which is set on fire through the negligence of another person, has a cause of action against that other for the injury, where the negligence is the proximate cause of the injury.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING CAUSE.—Where defendant's negligence was the proximate cause of a fire on his own premises which was communicated and caused damage to plaintiff's property, the fact that the state of the wind at the time aggravated the damage to plaintiff, and encouraged the spread of the fire more than it would have done under ordinary circumstances, does not constitute an intervening cause, relieving defendant from liability.

NEGLIGENCE—DEFINITION.—Negligence is the absence of such care as persons of ordinary prudence are expected to exercise under like circumstances.

George A. Farr, for the appellant.

Cutcheon & Swarthout, for the appellee.

MONTGOMERY, J. This is an action on the case for the destruction of plaintiff's house, barns, hay, and grain, orchard, and other property by fire claimed to have been caused by the negligence of the defendant. The plaintiff and defendant were farmers living on opposite sides of a highway running east and west through the township of Wright, in Ottawa county. The proofs tend to show that the defendant had a barn upon his premises on the south side of the highway, and abutting upon it, which on the twenty-seventh day of July, 1894, was filled with straw, hay, and other combustible material. Over the floor on the south side was a scaffold some six feet above the floor,

with straw and other things upon it. Across the highway were the barns of the plaintiff, some ten or twelve rods distant. The barns were filled with hay, and some twenty acres of wheat was stacked near them. The barns substantially joined. The dwelling was about two rods from the nearest barn. On the twenty-seventh day of July, 1894, the weather was very hot, and a drought had prevailed for some time. On that day the wind had risen with the sun, and had steadily blown from the direction of the sun, there being in the middle of the day quite a breeze. This had occurred regularly for several days prior to July 27th. At about 1 o'clock on the 27th, the wind came almost directly from the defendant's barn to those of the plaintiff. After dinner, on the twenty-seventh day of July, 1894, and a little before 1 o'clock, the defendant lit his pipe, went into his barn, and lay down on the hay or straw on the scaffold over the floor, smoking. He fell into a doze, the pipe fell into the straw, and, igniting it, set fire to the barn. This fire was rapidly communicated to the premises of plaintiff, and his barns, with hay, grain, dwelling-house, furniture, orchard, shade trees, fences, and personal property to the value of nearly three thousand dollars, were destroyed. There was no contributory negligence on the part of the plaintiff.

When the plaintiff rested his case, counsel for the defendant moved that the court direct a verdict for the defendant, for the reason that the plaintiff had not by ^{so} his proofs shown a cause of action. Thereupon the court directed the jury to render a verdict for the defendant, for the reason that the negligence of the defendant was not the proximate cause of the injury.

It is argued in this court that there was no evidence that the origin of the fire was the defendant's pipe. The evidence does, however, show that the defendant admitted that he lighted his pipe, and went into the barn, and lay down in the midst of the combustible material, and went to sleep, and that he stated that he supposed that his pipe must have slipped from his mouth while he was asleep. While it is true that this mere expression of opinion would not be conclusive, we think the facts shown were such as to require the submission of the origin of the fire to the jury.

It is also insisted that there was no evidence of negligence. It is said that there is no evidence of the danger of going into a barn with a pipe lighted or unlighted; that there is no evidence of communicating fire from a lighted tobacco pipe to oat straw; and counsel cite as a parallel case *Wood v. Chicago* etc.

Ry. Co., 51 Wis. 196, in which the testimony was that a lamp was left burning in a building which took fire, and the court seems to have expressed the opinion that the origin of the fire rested in mere conjecture, although the conclusion of the court apparently rests upon the ground that the leaving of a lighted lamp in a house is not negligence. Without discussing the soundness of that case, we think the distinction between leaving a lighted lamp in a house, and lying down to smoke in the midst of straw or other combustibles, is obvious, and that it was competent for the jury to draw such inferences from the proven facts as common knowledge would suggest.

The meritorious question is, Was the defendant liable for the consequences of the fire spreading from his own building to that of the plaintiff, if the fire in defendant's building be found to have originated in consequence of his negligence? In the absence of an intervening cause, it ⁸⁷ seems to us clear that the bare fact that the defendant may have suffered a loss of his own property through the same negligent act does not render him any the less liable to the plaintiff for a loss ensuing to him through that neglect. Whatever may have at one time been held under the statute (6 Anne, c. 31, sec. 6) which provided that no action should be maintained against any person in whose house or chamber any fire should accidentally begin, that statute is not applicable here. The subsequent statute (14 Geo. III, c. 78, sec. 86), which enlarges the statute of Anne, had received no judicial construction prior to the Revolution. Since then, however, it has been construed in *Filliter v. Phippard*, 11 Q. B. 347, and it is held not to include fires set or induced by negligence: See, also, 1 *Smith's Leading Cases in Equity*, 8th ed., 501, 502; *Ray on Negligence of Imposed Duties (Personal)*, 641; 2 *Shearman and Redfield on Negligence*, sec. 665; *McNally v. Colwell*, 91 Mich. 532, 30 Am. St. Rep. 494.

Was the defendant's negligence the proximate cause of the injury to the plaintiff? The question is not different than it would be if the building first fired through the defendant's negligence had belonged to a third person or the plaintiff. The question is, whether the owner of a building taking fire from another building, which is set on fire through the negligence of another, has an action against that other for the injury. This question has received consideration by this court. In *Hoyt v. Jeffers*, 30 Mich. 199, Mr. Justice Christiancy, speaking for the court, said: "If such other buildings are satisfactorily shown to have been actually burned by the fire of the Sherman House,

caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable, as well as the actual, result of the fire so caused, and without any contributory negligence of the plaintiff, I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first were five, six, or fifty feet, or the one-hundredth part of an inch, from it. And though a building thus burned by the fire of the first might be at such a distance that its taking fire from the ^{ss} first might not, a priori, have seemed possible, yet if it be satisfactorily shown that it did in fact thus take fire, without any negligence of the owner, and without the fault of some third party, which could properly be recognized as the proximate cause, and for which he could be held liable, the principle of justice or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned from equal liability for the burning of the second. If it be said that this extent of liability might prove ruinous to the party through whose negligence the buildings were burned, it may be said in reply that under such circumstances, it is better, and more in accordance with the relative rights of others, that he should be ruined by his negligence than that he should be allowed to ruin others who are innocent of all negligence or wrong": See, also, *Cooley on Torts*, 590; *Delaware etc. R. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *Perley v. Eastern R. R. Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469.

Was the wind an intervening cause? The evidence tends to show that it was an existing condition at the very time the negligent act occurred, and did not constitute an intervening efficient cause. The fact that the consequences of the defendant's negligent act were more serious than would have followed under other more favorable conditions of the atmosphere does not relieve the defendant: *Hoyt v. Jeffers*, 30 Mich. 199; 1 *Shearman and Redfield on Negligence*, sec. 30; *Fent v. Toledo etc. Ry. Co.*, 59 Ill. 349, 14 Am. Rep. 13; *Perley v. Eastern R. R. Co.*, 98 Mass. 414, 96 Am. Dec. 645.

It was a question for the jury as to whether the consequences of the defendant's negligent act ought to have been foreseen; and this is but another statement of the proposition that negligence is the absence of such care as persons of ordinary prudence are expected to exercise under like circumstances: *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469; *Ross v. Ionia*, 104 Mich. 320.

Judgment reversed and new trial ordered.

The other justices concurred.

NEGLIGENCE—FIRE CAUSED BY—QUESTION FOR JURY.—The question of negligence, where damage is caused by fire communicated from the property of one to the property of another, is one of fact for the jury to determine, and the proper subject of inquiry is, Did the person starting the fire use such care, caution, and diligence as a prudent and reasonable man would have exercised under the circumstances to prevent damage to others? Monographic note to McNally v. Colwell, 30 Am. St. Rep. 503.

NEGLIGENCE—STARTING OF FIRES.—One who negligently sets or negligently manages a fire set on his own property is liable to his immediate neighbor for damage caused to him by the spread of the fire onto such neighbor's property. The gist of the action is negligence. If that exists, either in setting or caring for the fire, and injury to another happens therefrom, liability attaches. It is immaterial whether such negligence is gross or only ordinary: Brummit v. Furness, 1 Ind. App. 401, 50 Am. St. Rep. 215. See the monographic note to McNally v. Colwell, 30 Am. St. Rep. 501.

NEGLIGENCE—PROXIMATE CAUSE—INTERVENING AGENCY—FIRES.—Where fire has been negligently communicated from the defendant's property to that of another, no wind, unless it be an extraordinary one, is an intervening cause sufficient to excuse the defendant. The fact that the wind drops and then rises again does not break the causation: Monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 824, 825.

NEGLIGENCE—DEFINITION.—Negligence is the failure to exercise such care, prudence, and forethought as duty, under the circumstances, requires should be given and exercised: Brotherton v. Manhattan etc. Co., 48 Neb. 563, 58 Am. St. Rep. 709.

ALLEN v. DUBOIS.

[117 MICHIGAN, 115.]

PLEDGE—POWER OF PLEDGEE—SHARES OF STOCK—CONVERSION.—Where a pledgor of stock certificates as collateral security is able to designate specifically the shares deposited, he is entitled to have the identical shares returned, or, in default of such return, to recover their value in trover.

PLEDGE—RETURN OF PROPERTY—SHARES OF STOCK—PRESUMPTION.—Where a pledgor of shares of stock is unable to specifically designate the shares pledged, the law will presume that shares in the pledgee's hands from time to time after the pledge were the identical shares deposited.

Charles A. Golden and Willis Baldwin, for the appellant.

E. R. Gilday and H. A. Lockwood, for the appellee.

¹¹⁵ LONG, J. Plaintiff brought suit upon a promissory note given by defendant. Defendant gave notice of setoff for

the alleged conversion of certain certificates of stock of one hundred shares each in the Iron Silver Mining Company, which were pledged with plaintiff as collateral security for the note sued upon. It appears that the plaintiff tendered back to the defendant certificates of shares of stock in the same company, but not the identical certificates received as such collateral. It was shown that the plaintiff sold from time to time certain of the shares of stock so deposited with him by defendant, and received certain moneys therefor. The record contains the admissions of the parties made during the trial, as follows: "Defendant admits that, if the plaintiff is not chargeable with the amounts received by him on the sale of the certificates of stock deposited with him by defendant, evidenced ¹¹⁶ by certificates A14,664, A14,665, A14,666, sold by him October 16, 1889, and certificate A8,608; sold by him January 14, 1890, and certificate A13,639, sold by him July 18, 1892, there is due plaintiff the sum of seven hundred and eighty-seven dollars and seventy-five cents. Plaintiff admits that, if he is chargeable with the amount received by him upon the sale of said stock above mentioned, there is due to the defendant the sum of eight hundred and sixty-seven dollars and twenty cents." The court below directed the verdict in favor of defendant for eight hundred and sixty-seven dollars and twenty cents. Plaintiff brings error.

The only question raised here is, whether the plaintiff is bound to return the identical shares of stock he received from the defendant. It appears that the plaintiff had on hand at all times a sufficient number of shares of the same stock to meet the pledge. It is contended by counsel for plaintiff that, inasmuch as one share was exactly like every other share of the stock, the defendant did not and could not suffer any damage by having returned to him other certificates of stock than those deposited, and therefore no action would lie. It appeared in the case that the five certificates for which the defendant was allowed a setoff against the note were fully identified. It is not contended that these certificates ever became the property of the plaintiff. He never had authority to sell them, and yet he did sell them at the price for which the defendant was permitted to recover in this action. These certificates were indorsed in blank, but several of them stood upon the books of the company in the name of the defendant. The others stood on the books in the names of the parties from whom defendant received them. They passed from hand to hand, and any holder could have them entered on the books of the company in his own

name. It has been held by this court that, where a party wrongfully sells a certificate of shares of stock in a corporation under such circumstances as to make him liable in trover, it is the shares of stock he is to be considered as having converted, and not merely the paper certificate which represents those shares; and that an action for the conversion will lie: *Morton v. Preston*, 18 Mich. 60, ¹¹⁷ 100 Am. Dec. 146. That trover will lie for shares of stock was held also in *Daggett v. Davis*, 53 Mich. 36, 51 Am. Rep. 91.

The shares being identified in the present case, so that the defendant could state specifically what shares were deposited, we think it is well settled that he is entitled to have the identical shares returned, and that, if not returned, the plaintiff would be liable for their value. It is true that, in the absence of any such designation, the law will presume that the shares so on hand from time to time were the shares deposited, because the parties have not reduced the shares to any more certainty: *Allen v. Dykers*, 3 Hill, 598. It was held in *Fay v. Gray*, 124 Mass. 500, that, if a certificate of stock in a corporation pledged as collateral security is transferred by the pledgee to a creditor of his own, the pledgor may treat this as a conversion, and the fact that the pledgee has a greater number of shares standing to his own credit on the books of the corporation is immaterial. In *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282, the other view was taken, and it was held that the identical shares need not be returned; but we think the great weight of authority is the other way. Counsel seem to think that the numerous cases are conflicting; but we think it will be found upon examination that where the stock pledged as collateral can be identified, and separated from the other stock, the pledgor is entitled to have a return of his identical shares. In many of the cases cited, the courts were treating of the rights between a broker who buys stock, and holds it as security for moneys advanced, and the parties for whom he purchases. In that class of cases it is held that the broker may satisfy his contract by turning over any shares he holds, and the only requirement is that he keep a sufficient amount on hand in his own name, and subject to his absolute control, to enable him to restore the shares purchased for the customer. But when stock is pledged as collateral security, and the stock is identified, the pledgor is entitled to a return of the shares pledged. Any ¹¹⁸ other rule than this would be at variance with the settled rule in this state that trover will lie for the conversion of such certificates of shares.

The court below very properly directed verdict in favor of defendant. The judgment must be affirmed.

The other justices concurred.

PLEDGE—SHARES OF STOCK—RETURN OF.—A pledgee of certificates of stock is not required to keep and return the identical shares pledged: *Gilpin v. Howell*, 5 Pa. St. 41, 45 Am. Dec. 720. In case of a pledge of stock to a broker, transferred to him on the books of the corporation without any distinguishing mark, he is liable if at any time while the contract is running he ceases to have sufficient shares to cover the pledge; nor will a mere right to recall sufficient shares hypothecated by him relieve him from responsibility. But he is not required to take out certificates identifying the particular shares pledged, and to retain them subject to the pledgor's order, but it is enough if he has at all times sufficient shares in his name: *Note to Dykers v. Allen*, 42 Am. Dec. 93. See, also, *Nourse v. Prime*, 4 Johns. Ch. 490, 8 Am. Dec. 606.

PEOPLE v. SCHOONMAKER.

[117 MICHIGAN, 190.]

RAPE—FEMALE UNDER AGE OF CONSENT.—The statutory offense of rape is constituted where sexual intercourse is had with a female under the age of consent, though such intercourse was not against her will.

MARRIAGE—PROOF OF CEREMONY—PRESUMPTION IN FAVOR OF.—Where there is proof of a marriage ceremony by an officer authorized to perform it under certain conditions, the presumption is in favor of the legality of his act, though the prerequisite conditions are not shown to have been satisfied.

GUARDIAN AND WARD—NATURAL GUARDIAN—STEPFATHER.—An orphan child's stepfather is not its natural guardian.

WITNESSES—WIFE AGAINST HUSBAND—RAPE BEFORE MARRIAGE.—A wife is not a competent witness against her husband in a prosecution for rape committed upon her before coverture. Such a case does not fall within a statutory exception to the wife's general incompetency to testify against her husband, allowed where "the cause of action grows out of a personal wrong or injury done by one to the other."

B. T. Halstead, for the appellant.

Fred A. Maynard, attorney general, and Clay E. Call, prosecuting attorney, for the people.

101 **MONTGOMERY, J.** The respondent was convicted of statutory rape. The complaining witness was at the time under sixteen years of age. It is not claimed that the act of intercourse was against the will of the complaining witness, but the offense is under the statute ample without such proof, as she is

in the law incompetent to give consent: *People v. Ten Elshof*, 92 Mich. 167.

When the complaining witness was called to the stand, she was interrogated by the respondent's counsel as to her competency. From the examination it appears that she had gone through a form of marriage with respondent before the judge of probate of Emmet county. Under certain conditions such a marriage is authorized by the terms of act No. 180 of the Public Acts of 1897. The prerequisite conditions were not affirmatively shown by the respondent or testified to by the witness. But, if the fact of marriage rendered her incompetent to testify to the facts in this case, the presumption from proof of a ceremony by an officer authorized to perform it is in favor of the regularity and legality of his act: 2 Wharton on Evidence, sec. 1297; 1 Bishop on Marriage, Divorce, and Separation, sec. 946.

The evidence shows that the complaining witness is an orphan, and that her stepfather did not give his consent ¹⁹² to the marriage. The circuit judge was of the opinion that this fact overcame the presumption of regularity. This view cannot be sustained. The stepfather is not a natural guardian of the child: Schouler on Domestic Relations, sec. 298.

The question is therefore presented as to whether the wife is a competent witness to the act charged as occurring before marriage. It is to be noted that act No. 180 of the Public Acts of 1897 makes no provision on this subject, and that, therefore, the general statute (3 Howell's Statutes, sec. 7546) must govern. That section declares the general incompetency of the wife, and contains an exception of cases where "the cause of action grows out of a personal wrong or injury done by one to the other." This provision is declaratory of the common law, and has its origin in the recognized necessity of protection to the injured spouse: Wharton's Criminal Evidence, sec. 393; Lord Audley's Case, 3 How. St. Tr. 402. The exception has also been applied in cases of abduction followed by marriage: Wakefield's Case, 2 Lew. C. C. 279; Reg. v. Yore, 1 Jebb & S. 563. But we know of no case which extends the exception to the general rule further. The marriage in this case was not induced by the wrong of which the witness was permitted to give testimony, and we think the case does not fall within the spirit of the exception to the general rule. The wife was not a competent witness.

The conviction will be set aside and a new trial ordered.

The other justices concurred.

RAPE—FEMALE UNDER AGE OF CONSENT.—Under a statute making the having carnal knowledge of a female under sixteen years of age rape, whether she consented or not, the defendant may be convicted, though he did not know her age: *Commonwealth v. Murphy*, 165 Mass. 66, 52 Am. St. Rep. 496; *State v. Houx*, 109 Mo. 654, 32 Am. St. Rep. 686.

MARRIAGE—CEREMONY—VALIDITY—PRESUMPTION.—From the celebration of a marriage the law presumes a contract of marriage, the capacity of the parties, and everything essential to a valid marriage: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105. The presumption in favor of the legality of a marriage is one of the strongest known to the law: *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649.

GUARDIAN AND WARD—NATURAL GUARDIAN.—Where the parents of a minor are dead, its grandfather or grandmother, when the next of kin, is his natural guardian: *In re Benton*, 92 Iowa, 202, 54 Am. St. Rep. 546.

WITNESSES—WIFE AGAINST HUSBAND—RAPE.—A wife is not a competent witness against her husband in a prosecution against him for a rape committed on her prior to their marriage: *State v. Evans*, 138 Mo. 116, 60 Am. St. Rep. 549. A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted: *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, and note.

VREELAND v. TURNER.

[117 MICHIGAN, 366.]

CONTRACTS—PUBLIC POLICY.—Where the creditors of an insolvent estate have joined in a proceeding in their common interest as creditors, a contract whereby one of them seeks to obtain a secret advantage over the others is void as against public policy.

James H. Pound, for the appellant.

E. T. Wood, for the appellee.

see MONTGOMERY, J. This is an action of assumpsit. At the close of the testimony, the circuit judge directed a verdict for the defendant, and plaintiff brings error.

The cause of action stated in the declaration is that plaintiff "had a valid claim against the estate of David Wallace, an incompetent, which he forebore to press upon the express promise of Robert Turner to pay the same to him, said claim being otherwise good, and a valid and legal claim." On the trial the following facts appeared: Plaintiff had a claim of two hundred and thirty dollars against the estate of David Wallace,

deceased. David Wallace had in his lifetime conveyed all of his property to his wife, Harriet J. Wallace, who died before her husband. Defendant was executor of the estate of Harriet J. Wallace. The administrator of the estate of David Wallace, George McDonald, ³⁶⁷ had filed a bill to set aside the conveyance from David Wallace to Harriet J. Wallace in the interest of creditors of David Wallace's estate. On the filing of this bill in the interest of these creditors, a bond was executed by the administrator of the David Wallace estate and four of the creditors of said estate, of whom plaintiff was one, as security for costs. Plaintiff's counsel states in his brief his inference from the testimony, as follows: "That plaintiff went upon said bond, and furnished the cosecurity, so that he could get what was coming to him; when the defendant came to plaintiff, and asked him to get off the bond, and withdraw his aid from the suit, in consideration of which action defendant promised plaintiff to pay him a certain sum of money, agreed, as plaintiff claims, to be the sum of two hundred and thirty dollars; that this proposition, which plaintiff claims defendant accepted, was greatly to defendant's personal profit."

The questions raised by defendant's counsel are whether this alleged promise was an original promise or a collateral promise. It appears that the plaintiff received from the estate of David Wallace fifty-seven per cent of his claim later on, and it does not appear affirmatively that the estate of David Wallace was discharged of any obligation to plaintiff. The circuit judge held that the agreement, as testified to by plaintiff, was, under the circumstances disclosed, against public policy. We are cited to no case directly in point, but we think, on principle, the ruling of the circuit judge should be sustained. The proceeding instituted was in the interest of the several creditors of the David Wallace estate. By the agreement made, one of these creditors sought to secure an advantage over the other creditors by a secret arrangement, which the law does not favor. The case is in principle like that of *Adams v. Outhouse*, 45 N. Y. 318. In that case several of the next of kin were about to take proceedings against the administrator to oppose his account of the estate, and to compel him to account for other personal property claimed to have been appropriated by him. He secretly promised two of them that, if they would acquiesce in ³⁶⁸ his account, he would pay them a certain sum. They acquiesced, and the others ceased opposition, and came to a settlement. The promise was held void. In the present case the

plaintiff and the other creditors of the David Wallace estate were seeking to reach a fund in which they had a common interest. It was bad faith in the plaintiff to seek to divert any portion of that fund, and the contract must be held to be against public policy: See *Greenhood's Public Policy*, 133.

Judgment will be affirmed, with costs.

The other justices concurred.

DEBTOR AND CREDITOR—COMPOSITIONS—CONTRACT VIOLATING.—If a composition agreement is entered into between a debtor and his creditors, and one of them makes with him some secret agreement to secure an advantage over the others, this latter agreement is void, and must be disregarded: *Note to Powers Dry Goods Co. v. Harlin*, 64 Am. St. Rep. 470.

GRIFFIN v. MCGAVIN.

[117 MICHIGAN, 372.]

CREDITOR'S SUIT.—A JUDGMENT THAT IS MERELY IRREGULAR, and not absolutely void, is a sufficient foundation for a bill in aid of execution.

JUDGMENTS—DEFAULT ON DEFECTIVE SERVICE.—Where, in an action commenced by filing a declaration, the declaration is served, and, upon defendant's nonappearance, a judgment is taken upon entry of his default, but, although a proper rule to plead is entered, there is no service of notice of the rule, such failure of service, though it renders the judgment irregular, is not such a defect as to render it void for want of jurisdiction and therefore subject to collateral attack.

D. E. Corbitt, for the complainant.

Taggart, Knapp & Denison, for the defendant McGavin.

372 **HOOKE**R, J. The complainant recovered a judgment against the defendant upon a replevin bond, in an action commenced by filing declaration. The bill in this cause is filed in aid of execution, and was dismissed upon the hearing, upon the ground that the judgment mentioned was void for want of jurisdiction of the defendant. The sheriff's return indorsed upon the declaration, which was within the wrapper upon which the rule to plead was printed, is as follows:

"I certify that on the twelfth day of October, 1895, I served a copy of the within declaration on John Tierney **373** and Frank McGavin, giving each of them a copy of the within; and on the

twenty-first day of October I served a copy on Michael Collins, giving him a copy of the within.

"October 21, 1895.

IRVING WOODWORTH,

"Acting Sheriff.

"By Nicholas Bouma,

"Deputy Sheriff."

The defendant did not appear, and judgment was taken upon entry of his default. There was no showing of service of notice of rule to plead to support the entry. After the answer in this cause was filed, the complainant made a motion in the action upon the bond for leave to amend, which was granted upon a condition with which he never complied.

If the judgment rendered was irregular merely, and not absolutely void, it is a sufficient foundation for the complainant's bill. This court has been liberal in holding proceedings amendable in actions commenced by declaration, where a proper service has been shown. In *Coe v. Hinkley*, 109 Mich. 614, it was held that, when a proper service was shown, an entry of the rule to plead nunc pro tunc was permissible. In *Granger v. Judge of Superior Court*, 44 Mich. 384, the rule to plead entered and served required a ten days' notice only, while the statute prescribed twenty. On mandamus to vacate a judgment entered upon default for want of an appearance, the writ was denied upon the ground that the mistake was an irregularity, and, the judgment not being void, the defendant should have seasonably taken steps to review it; that, like any other process, it was amendable; and that, where there has been an actual personal service of the defective process or notice, it has not been held that the proceedings are void. The reason given is that: "The party, having been legally served within the jurisdiction, is personally informed that proceedings will be urged against him. He has a right to expect that in due time the plaintiff will discover the error and take steps to rectify it. If this is not done, he has a right to the common-law remedies for the correction of errors, and may, until those are lost by lapse of time, resort to them, to have relief against the erroneous action. But it is not ³⁷⁴ settled and would be unjust to allow a party to attack such proceedings collaterally after long lapse of time when the plaintiff has lost any other remedy, and thus avoid what was probably a just liability. If he does not see fit to sue out a writ of error, when he knows where the proceedings are pending, and has had full opportunity to examine

into the action of the court, he should not, in fairness, be allowed the advantage of what is a merely formal objection, and we do not think the authorities cited sustain any view to the contrary.

"Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So, where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party, therefore, has not been notified in any proper way of anything. The purpose of the statutory methods is to furnish means from which notice may possibly or probably be obtained. But, as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and, if not regular, cannot be said to have been conducted under the statutes. The distinction is obvious, and is not imaginary.

"Here there was proper notice of a pending suit, the only defect being the fixing of too short a time for appearance. While the defendant sued had a right to insist on proper adherence to the rules governing such cases, he should have brought error when he found the plaintiff expected to enforce his judgment. If this had been a notice after the party had been regularly served and the suit fairly in progress, the authorities are uniform that the defect would be waived entirely unless seasonably complained of. There is no hardship in the rule which requires in such a notice as the present resort to some recognized method to correct the error, instead of treating it as fatal for all purposes": See, also *Brown v. Wayne Circuit Judge, McGrath*, Mand. Cas. No. 21.

In the present case, the proper rule was entered, but there was no service of any notice whatever, in which ²⁷⁵ respect it differs from the *Granger* case, where there was a service, but it was of notice of the defective rule. In each case the declaration was served.

The case of *Turrill v. Walker*, 4 Mich. 177, recognizes the rule applied in the last-mentioned cases, but it contains language which, at first blush, might be thought to support the defendant's contention; but we think it does not necessarily,

as all the case holds is that, where no notice of the rule was served, a judgment upon default would be reversed on writ of error, and that, by "neglecting to move promptly when the plaintiff took the next step," the defendant did not waive the defect, which he might still take advantage of on writ of error. The judgment was reversed, and, as the service was shown to be out of the county, it is presumed that it was the end of the matter. It is significant that the court did not say that the judgment was void by reason of the failure to give notice of the rule to plead.

The declaration in this case, at least, contains the statement that it was filed as commencement of suit. It would seem that this gave notice of that fact, and it must be presumed that the defendant had knowledge of the law that, upon service of notice of the entry of rule to plead, he would be obliged to appear and make his defense. The irregular service might be corrected at any time, but it was ground for reversal of any judgment that might be rendered until corrected or waived, but not such a defect as to render the entire proceedings void for want of jurisdiction, and therefore subject to collateral attack.

It being determined that the judgment was valid, the premises were subject to levy, and complainant entitled to the relief prayed. A decree may be entered reversing that of the circuit court, and granting the relief prayed in complainant's bill, with costs of both courts.

The other justices concurred.

CREDITORS' SUIT—JUDGMENT AT LAW.—It is a general rule that a creditor cannot resort to equity for aid in the collection of his debt until he has established his claim by recovering judgment thereon. The judgment recovered by the debtor on his claim cannot be impeached collaterally, neither can its regularity be questioned upon a creditors' bill: Monographic note to *Ladd v. Judson*, 68 Am. St. Rep. 276, 277.

JUDGMENTS BY DEFAULT—DEFECTIVE SERVICE.—A judgment by default in a condemnation proceeding in which the defendant was personally served with process five days before the return day is not subject to successful collateral attack on the ground that statute requires "at least six days' notice": *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646; *Stafford v. Gallops*, 123 N. C. 19, 68 Am. St. Rep. 815.

DICKEY v. CONVERSE.

[117 MICHIGAN, 449.]

TENANCY BY ENTIRETIES GROWS OUT of the unity of husband and wife and is unlike that of joint tenants, who are each seised of an undivided moiety. Each of the spouses is seised of the whole, and not of undivided moieties.

EXECUTION.—A CROP raised on land held by a husband and wife by entireties is held by them in the same manner and subject to the same law as the land itself, and such crop is therefore not subject to levy and sale on an execution against the husband.

ENTIRETIES—TROVER FOR CROPS RAISED ON LAND HELD BY.—An action of trover for crops raised upon land held by entireties, and levied upon and sold on an execution against the husband for a debt pre-existing the inception of the tenancy by entireties, cannot be defended on the ground that the land was taken under such tenancy with the intention of fraudulently avoiding payment of such debt, where the entire property was acquired subsequently to the judgment, and no attempt has been made in equity to set aside the deed to the husband and wife as in fraud of creditors, and where it does not even appear that the land held by entireties exceeds in value the statutory homestead exemption.

Corvis M. Barre, E. J. March, and F. A. Lyon, for the appellant.

Bailey & James, for the appellees.

⁴⁴⁹ **MOORE, J.** In October, 1885, the plaintiff Edgar P. Dickey gave his note for Bohemian oats for one hundred and sixty dollars. In ⁴⁵⁰ September, 1889, Mrs. Salmon recovered in the circuit court a judgment upon this note. Afterward, an execution was issued, and placed in the hands of the sheriff, who is defendant in this case. In September, 1894, he levied upon crops grown upon an eighty acre farm, occupied by the plaintiffs in this case. He afterward sold the crops, and the plaintiffs sued him in trover for the conversion. The case was tried by the circuit judge, who gave judgment in favor of plaintiffs. He also made findings of fact and conclusions of law. Defendant brings the case here by writ of error.

The record discloses that prior to November, 1881, John H. Dickey bought the farm for the purpose of selling it to his son Edgar and his nephew John Bennett, and made a contract with them by which they agreed to assume a mortgage of twelve hundred dollars, which was on the farm, and to pay him one thousand dollars. Under this agreement, Dickey and Bennett were in possession of the premises about two years, when some trouble arose, and the contract and premises were surrendered

to the elder Dickey. Edgar afterward worked the farm for his father, who in the meantime had increased the mortgage upon the farm until it amounted to seventeen hundred dollars. It was the verbal agreement between Edgar and his father that, if Edgar would reimburse his father for what the farm cost him, the father would deed it to Edgar. In July, 1886, the plaintiffs were married, and moved into the house upon the farm. Under the verbal arrangement, Edgar turned over to his father more or less of the proceeds of the farm, until they considered he had paid four hundred dollars in that way, prior to February, 1892. Edgar also built a barn and an addition to the house upon the farm. In February, 1892, it was arranged that, upon the payment of one hundred dollars to John H. Dickey, and the assumption of the seventeen hundred dollars mortgage by the plaintiffs, John H. Dickey would deed to them the farm. For the purpose of raising the one hundred dollars, the father of Mrs. Mary A. Dickey signed a note with her husband. The money was obtained at a bank, and paid to the elder Dickey. When this note was ⁴⁵¹ given, it was agreed the deed should be given to Edgar P. Dickey and his wife. This note was afterward paid with the proceeds of the farm. The deed was made and delivered to them in 1892, but was not put upon record. The crops levied upon were grown in 1894.

Of course, the findings of fact made by the circuit judge are conclusive. His findings, so far as it is necessary to refer to them, are as follows: "The consideration of the deed from John H. Dickey and wife to Edgar P. and Mary A. Dickey, so far as it was paid at all, was paid by Edgar P. Dickey out of his own funds, except that one hundred dollars of said amount was paid with proceeds from the farm after it was so purchased, and except that there was a mortgage upon said premises for seventeen hundred dollars, upon which both Edgar P. Dickey and Mary A. Dickey are liable. The title was taken by Edgar P. and Mary A. Dickey through a quitclaim deed from the father, and at that time there were seventeen hundred dollars of mortgages upon the premises, previously given by the father. The title of both Mary and Edgar was therefore subject to these mortgages, amounting to seventeen hundred dollars. As a matter of law, the court doth find that she was under the same obligation to discharge this mortgage encumbrance as was her husband—no more and no less. Neither of them was responsible for the payment of this mortgage by reason of any covenants in the conveyance by which they took the land. The

amount of the consideration paid by the said Edgar P. out of his own funds was four hundred dollars. Said Mary A. Dickey never actually paid anything of the consideration for this conveyance of February 3, 1892, except what was contributed of the products of the farm after it was so purchased by them. One hundred dollars of the consideration was paid from the products of the farm grown after title was in Mary A. and Edgar P. Dickey. This deed to Edgar P. and Mary A. Dickey the court finds to have been taken in the names of both, in the belief that it could not be reached by said execution creditor to satisfy her execution, and to hinder and delay said execution creditor in the collection of her judgment. The wheat, oats, and hay levied upon and in controversy in this case were cut upon said farm, which was managed by the said Edgar P. and Mary A. Dickey in the way in which farms are ordinarily run and managed ⁴⁵² by husband and wife where the title is in the husband; that is to say, the said Edgar P. looked after the cultivation and management of the farm so far as the outdoor work was concerned, and marketed the products, the said Mary A. doing the work in the house, and, to some extent, out of doors, such as farmers' wives in the country are sometimes accustomed to do. The said Edgar P. does not personally perform all the labor. The property in question in this suit were the products of said farm, planted, grown, and harvested since the deed of February 3, 1892. There was no arrangement or agreement between the husband and wife as to the ownership of the products of the farm."

The court found, as a matter of law: "That as this property was planted, grown, and gathered since the giving of the deed of February 3, 1892, there having been no agreement or arrangement between the said Edgar P. and Mary A. that either should have any other interest than such as would result from their joint ownership in the land, the title to such harvested products was, like the title to the land, in the said Edgar P. and Mary A., as tenants by the entirety, and, as such, not subject to execution for the individual debt of either."

The defendant considers the questions involved under two propositions, which he states as follows: "1. Are the crops raised by the husband upon a farm owned by himself and wife, as tenants by entirety, or any part thereof, subject to the payment of the debts of the husband? 2. Did the purchase of this farm by said Edgar P. Dickey, and the taking of the title thereto in the names of himself and wife for the purpose of

defeating and delaying the collection of this Salmon judgment, deprive the said Hannah E. Salmon of the right to levy her execution upon the crops raised thereon? In other words, can the fraud of said Edgar P. Dickey, in taking this deed in the name of himself and wife, be shown, in an action at law, for the purpose of subjecting the crops raised upon said farm to the satisfaction of this judgment taken against said Edgar P. Dickey individually?" He answers the first proposition in the affirmative, and, as to the second proposition, says the fraud can be shown for the purpose of subjecting the property to this levy.

⁴⁵³ It is claimed the holding of plaintiffs is that of tenants by entirety, and that the husband is entitled to the full control of the rents and profits of the land during the joint lives, to the exclusion of the wife, and that the crops grown would be subject to the claims of creditors. A good many cases are cited in support of this proposition, but these cases are not in accord with the holdings of this court, as will hereafter be shown.

It is also argued that even though it is said that the married woman's act gives her full control of her property, including her interest in estates by entirety, it does not give her any right to control the husband's interest therein, and the crops raised upon such lands are owned by husband and wife as tenants in common, and one-half of them are liable to the payment of his debts: Citing *Buttler v. Rosenblath*, 42 N. J. Eq. 655, 59 Am. Rep. 52; *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762. The first of the cases does not relate to the question of who is entitled to crops grown upon land held by tenants in entirety, but it does hold that "the wife is endowed with the capacity during the joint lives to hold in her possession, as a single female, one-half the estate in common with her husband, and that the right of survivorship still exists as at common law," and that the interest of the husband in the real estate might be reached by creditors. In the case of *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, it was held, where a husband executed a mortgage upon lands deeded to himself and wife, that the mortgage was effectual to convey his interest, which was a right to the use of an undivided one-half of the estate during the joint lives, and to the fee in case he survived his wife, and that, by the foreclosure and sale, the purchaser acquired this interest, and became a tenant in common with the wife of the premises, subject to her right of survivorship. As we understand the decisions, these cases are in

direct conflict with our own court, and not in harmony with the law in relation to tenancy by entirety.

In *Fisher v. Provin*, 25 Mich. 347, where land was ⁴⁵⁴ conveyed in fee to husband and wife, it was held they did not take as tenants in common. In *Aetna Ins. Co. v. Resh*, 40 Mich. 241, it was held that, where husband and wife were in possession of a house granted to them by the same deed, the husband "was neither a tenant in common nor an ordinary joint tenant. His estate in case of his death went by survivorship to his wife, and during their lives, whatever his right may have been, it was not an undivided half of the property." In *Manwaring v. Powell*, 40 Mich. 375, it is said that husband and wife, under a grant made to them jointly, take by entirety, and, therefore, whatever would defeat his title would defeat hers also. In *Jacobs v. Miller*, 50 Mich. 119, it was said: "The grant ran to the parties of the second part as husband and wife, and it was intended to make an estate by which the property should be held by entirety. The ingredients and incidents of such a title or estate give it an exclusive character, and distinguish it from all other modes of holding. The persons of the second part do not take by moieties, but are seised of the entirety, and the survivor takes the whole, and during the joint lives neither can alien so as to bind the other."

In *Vinton v. Beamer*, 55 Mich. 559, where a judgment creditor had levied upon and sold the interest of the husband, which was a life estate in one hundred and sixty acres of land for himself and wife and the survivor of either of them, a deed was issued, and, after the redemption period expired, ejectment was brought. The court held it could not be maintained. The court said: "The interest William Beamer took with his wife was a peculiar one. It was an entirety: *Fisher v. Provin*, 25 Mich. 347. They both took the same estate, the same interest, and it could not be separated. The right of the one was the right of the other. Neither could, by a separate transfer, affect the rights of the other or his own. What would defeat the interest of one would also defeat that of the other: *Manwaring v. Powell*, 40 Mich. 375. . . . William Beamer had no such distinctive estate in the premises as was here attempted to be sold upon ⁴⁵⁵ the execution, and which the plaintiff seeks to recover in his ejectment, and the court in this ejectment suit cannot invest him with it."

In *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556, it was held a married woman could not be liable upon a joint contract

with her husband for the erection of a building upon real property held by them as tenants by entirety. Of the character of the property the court said: "During the lives of both, neither has an absolute inheritable interest. Neither can be said to hold an undivided half. They take by entireties, and, at the death of the wife, the whole passes at once to the husband. . . . This is not such separate property of the wife as the statute gives her power to make contracts in relation to. She can neither sell, encumber, nor control it while living, nor devise it at her death."

In *Lewis' Appeal*, 85 Mich. 340, 24 Am. St. Rep. 94, it was held that husband and wife take as tenants by entirety, and not as joint tenants, under a joint deed to both, and the estate thus created, with the attendant right of survivorship, is not affected by a decree of divorce. The court quoted at length and with approval the language used in *Speier v. Opfer*, 73 Mich. 35, 16 Am. St. Rep. 556.

In *Naylor v. Minock*, 96 Mich. 182, 35 Am. St. Rep. 595, it was held that neither a husband nor wife can convey the estate vested in them as tenants in the entirety by his or her sole deed, and any instrument by which either attempts to make such conveyance is void.

It will be seen that *Buttler v. Rosenblath*, 42 N. J. Eq. 655, 59 Am. Rep. 52, and *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, are in direct conflict with these cases: See, also, *McCurdy v. Canning*, 64 Pa. St. 39.

This species of tenancy grows out of the unity of husband and wife, and is unlike that of joint tenants, who are each seised of an undivided moiety. The husband and wife are each seised of the whole, and not of undivided moieties: *Hardenbergh v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 378, note.

What is the purpose of the use of a farm? Is it not a ⁴⁵⁶ place to live upon, to grow crops for consumption and sale? If neither the husband nor the wife has an undivided moiety of the use of the farm, how can it be said each of them has an undivided interest or moiety in the result of that use? To hold that the husband is not entitled to an undivided moiety of the use of the farm, but is entitled to an undivided half of the results of that use, is, we think, illogical. While the precise question involved here has not been decided by this court, it has been before the supreme court of Indiana in *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254, where it was held that "a crop raised on land held by a husband and wife

by entireties is held by them in the same manner and subject to the same law as the land itself, and such crop is therefore not subject to levy and sale on an execution against the husband."

Passing to the second branch of the case, it is said that as the trial court has found the land was purchased by Mr. Dickey with his own funds, and the title was taken in the joint names of himself and wife, in the belief it could not be reached by Mrs. Salmon, the execution creditor, and to hinder and delay her in the collection of her judgment, this was a fraud upon her, and the defendant is entitled to recover. Does this follow? Mr. Dickey was a householder. He was entitled to a homestead, not exceeding forty acres in extent and fifteen hundred dollars in value. He was occupying eighty acres of land to which he had no legal title, upon which he had paid four hundred dollars, and made improvements the extent and value of which are not clearly shown. It is doubtful if at this time he had any interest in this land which would have been subject to levy and sale. Was it a fraud upon his creditors, under such circumstances, for himself and wife to assume an indebtedness of seventeen hundred dollars, and to turn over a sum of money previously paid by the husband, and improvements made by him, which with the sum of money do not exceed in value the fifteen hundred dollars allowed for homestead purposes, upon an agreement that the land should be conveyed to both of them? It has been ⁴⁵⁷ held time and again that a conveyance by a debtor of land exempt as a homestead is not a fraud upon creditors: *Smith v. Rumsey*, 33 Mich. 183. See 2 Howell's Statutes, sec. 7722, note. It is not at all certain that a court in chancery would set aside this conveyance upon the application of a creditor as a fraud upon him; but, as that question is not directly before us, we express no opinion upon it.

There was no evidence on what part of the eighty acres the crops were grown. They were grown two years after the deed was made to Mr. and Mrs. Dickey, and the court found there was no agreement between the husband and wife as to the ownership of the products of the farm. In *Hill v. Chambers*, 30 Mich. 422, it was held that the presumption in relation to the ownership of crops, in the absence of any proof, is that ownership of products follows the title. Of course, this presumption may be overcome by proof. In *Bump on Fraudulent Conveyances*, fourth edition, section 475, it is said: "The grantee has a valid title until the creditors, by asserting their rights in

due course of law, defeat it, and, when defeated, it is not rendered void ab initio, but only from the time of the levy of the execution under which the property is sold. . . . For the same reason, when land is fraudulently conveyed, the creditors cannot levy upon the crops subsequently produced by him, or upon property which he has converted from realty into personalty."

The defendant says there are qualifications to this rule, and that this case comes within the qualification that, if the creditors can show the transfer was colorable, the creditors may levy upon the crops, and that it is not necessary to have the deed set aside before the levy can be made: Citing *Pierce v. Hill*, 35 Mich. 194, 24 Am. Rep. 541; *Fury v. Strohecker*, 44 Mich. 337. In the first of these cases the levy was made upon a crop growing at the time of the transfer. In the second case it was held that where land is fraudulently conveyed, and the fraudulent grantor retains an interest in crops subsequently ~~458~~ grown by an understanding with the grantee, the crops may be reached by a judgment creditor.

No steps have been taken to set aside the deed. The deed itself was not made by Mr. Dickey to his wife, and he never had any legal title to the land separate and apart from the title of his wife. It is not shown any agreement was made as to who should own the crops. Take the case as made, we cannot say the court erred in his disposition of the case.

Judgment is affirmed.

The other justices concurred.

ESTATE BY ENTIRETIES.—An estate by entirety is founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife: *Stels v. Shreck*, 128 N. Y. 263, 26 Am. St. Rep. 475. A conveyance to husband and wife vests in them a peculiar estate, having, like joint tenancy, the attribute of survivorship, but distinguished from joint tenancy by the fact that each takes the whole title: *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517. See the monographic note to *Den v. Hardenbergh*, 18 Am. Dec. 384.

ENTIRETIES—CROPS—EXECUTION.—In Indiana, it is held that crops raised on land held by husband and wife as tenants by entireties are also held by entireties, and are, therefore, not subject to levy under an execution issued against the husband alone: Monographic note to *Den v. Hardenbergh*, 18 Am. Dec. 383. But in *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762, it was held that at common law a husband was entitled to the full control of land held in entirety, and to take all rents and profits of the land during the joint lives to the exclusion of the wife, and he had power to sell, mortgage, or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors: See, also, *Cole Mfg. Co. v. Collier*, 95 Tenn. 115, 49 Am. St. Rep. 921, and note.

ENTIRETIES—FRAUDULENT CONVEYANCE.—A husband and wife, by jointly purchasing real estate and having it conveyed to them jointly, cannot thus create an estate in entirety at the expense of the husband's creditor, and hold it in fraud of his rights: *Newlove v. Callaghan*, 86 Mich. 297, 24 Am. St. Rep. 123.

CARPENTER v. SNOW.

[117 MICHIGAN, 489.]

WILLS—AFTER-BORN CHILDREN.—At common law, marriage of a testator and the birth of a child after a will was made revoked the will.

WILLS—OMISSION OF AFTER-BORN CHILDREN.—Under the statutes of Michigan, if children are born to a testator after making his will, making no provision for them, unless it appears from the will that the omission was intentional, such children share in the estate the same as if the father had died intestate.

WILLS—PRETERMITTED CHILD.—Under a statute allowing a child to share in the estate of its parent as if the latter had died intestate, where such parent omits to provide in his will for such child, if it does not appear that such omission was intentional, the question as to whether or not such omission was intentional is one of fact, triable by proceeding at law.

Whitney C. Beckwith, for the complainant.

Walker & Spalding, for the defendant, Mary L. Snow.

Matthew Finn, for the infant defendants.

⁴⁹⁰ MOORE, J. This is a proceeding to construe a will made by Herbert M. Snow, who was married in 1883. July 8, 1884, Clara L. Snow was born. The will in question was made April 20, 1888. Harry A. Snow was born May 7, 1889, and Gertrude E. Snow was born April 28, 1892. All these children were living when the death of Mr. Snow occurred, in October, 1897. Mr. Carpenter was named as executor in the will. Omitting the formal parts of the instrument, it reads as follows: "Second. After the payment of my debts and the expenses of administering my estate, I give, devise, and bequeath all my property, real and personal, and all the property of every kind and nature whatsoever of which I may die possessed, to my beloved wife, Mary L. Snow."

As no provision was made in the will for Clara, who was born before the will was made, or for the two children born afterward, the bill is filed to determine the respective rights of the widow and children. In the court below a decree was made

holding the after-born children took no portion of the estate, and providing: "This decree is made without prejudice to the rights of the defendant Clara L. Snow to take proceedings at law to determine whether the omission to provide for her in said will was made intentionally, or by mistake or by accident."

Extraneous testimony was taken, which, if competent, shows that Mr. Snow intended to give all his property to his wife to the exclusion of his children, having confidence in her management of the property, and her sharing it with the children. While this testimony may be competent to show that the omission to provide for Clara was not unintentional, we do not think it competent to show that the testator did not intend to provide for his unborn children.

The provisions of the statute applying to the facts disclosed by this record are as follows: 2 Howell's Statutes, section 5809, provides: "When any child shall be born after the making of ~~401~~ his father's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." Section 5810 provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section."

It will be noticed the language in the two sections with reference to showing the intention of the testator is not at all alike. In the last-named section it is not required that the omission to provide must be shown by the will itself to be intentional. This section has been construed by this court in Stebbins' Estate, 94 Mich. 304, 34 Am. St. Rep. 345, where it is held the question as to whether the omission to provide for a child in the will was intentional or otherwise is a question of fact which may be submitted to a jury. Section 5809 has never been construed by this court. The decisions of other courts cannot be harmonized. The case of Hawhe v. Railroad Co., 165 Ill. 561, is in harmony with the decree made by the trial judge.

The language of the statute would seem to be very plain. At the common law, marriage and the birth of children after

the will was made would revoke the will. The legislature evidently had in mind that, if the father failed to make provision in his will for the unborn child, the law should make provision for it, unless the parent made it clear in the will itself that the omission to provide was intentional. How can it be said from the language used in this will that the father intended to cut off from inheriting his property two children who afterward came to him, when no reference is made to them in the will, and ⁴⁹²neither of them was at that time conceived? A similar statute to this was construed in *Bresee v. Stiles*, 22 Wis. 120, where it was held the unborn children were to take the same share in the estate as if the parent had died intestate. A like statute was construed in *Wasserman v. Chicago etc. Ry. Co.*, 22 Fed. Rep. 872. We cannot do better than to quote from the opinion of Justice Brewer:

"In this case, the primary question I am reluctantly compelled to decide in favor of the complainant, *Wasserman*. I say reluctantly, for when a man on the eve of death, having a child five years of age, and living with a wife to be delivered of a second child within twenty days, makes a will giving all his property to his wife, I think the common voice will say that he intended no wrong to either the born or unborn child, but trusted to his wife—their mother—to do justice by each, and believed that she, with the property in her hands, could handle it more advantageously for herself and children than if interest in it were distributed. As a question of fact independent of statute, I have no doubt that Mr. *Wasserman* had no feeling either against the born or unborn child, but, having implicit faith in his wife, meant that she should take the entire property, and believed that out of that property and her future labors she would take care of his children. But the legal difficulty is this: The statute says that it must be 'apparent from the will' that the testator intended that the unborn child should not be specially provided for. How can any intention as to this child be gathered from the will alone? It simply gives everything to the wife—is silent as to children. If I could look beyond the will, my conclusion would be instant and unhesitating. Limited by the statute to the instrument itself, what can be gathered therefrom? It is simply a devise of all the property to the wife. No reference is made to children, born or unborn. Can I infer from its silence an intention to disinherit? If so, the mere omissions from a will would always stand as proof of an expressed inten-

tion. And whatever of apparent hardship there may be in the present case, a fixed and absolute rule prescribed by statute cannot, for such reason alone, be ignored. That the rule was intentionally thus prescribed is evident, not alone from the clear letter of the statute, but also from the history of this question at common law, and the various provisions of the statutes of other states. At common ⁴⁹³ law the will of an unmarried man disposing of all his property was presumably revoked by his subsequent marriage and the birth of a child. This rule was borrowed from the civil law. Whether revocation would follow from subsequent marriage alone or birth of child alone was, perhaps, a doubtful question. In *Brush v. Wilkins*, 4 Johns. Ch. 506, it was held that both must concur, while in *McCullum v. McKenzie*, 26 Iowa, 510, the birth of a child alone was adjudged sufficient. See, generally, upon this question, 1 Redfield on Wills, c. 7; 1 Williams on Executors, c. 3, sec. 5; 4 Kent's Commentaries, 521-526.

"It was also for a while at least, disputed whether such revocation followed absolutely from subsequent marriage and birth of child, or was only to be presumed, and the presumption subject to be overthrown by evidence of the testator's intentions. Lord Mansfield, in *Brady v. Cubitt*, 1 Doug. 39, ruled that the presumption of revocation from marriage and the birth of issue, like all other presumptions, 'may be rebutted by every sort of evidence': See, also, *Johnston v. Johnston*, 1 Phillim. 473. Such seems to have been generally the ruling of the ecclesiastical courts. On the other hand, in *Goodtitle v. Otway*, 2 H. Black. 522, Chief Justice Eyre held that 'in cases of revocation by operation of law, the law pronounces upon the ground of a *presumptio juris et de jure* that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of circumstances to be set up in evidence to repel it.' And in the leading case of *Marston v. Roe*, 8 Adol. & E. 14, by all the judges in the exchequer chamber, it was finally decided that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself. Such being the final solution of the question in the English courts, it cannot be that the purpose of the statute in question was to open the door to any other evidence of intention than those expressly named. On this side of the waters the matter has generally been regulated by statute, with a prevailing tendency to declare that the after-born child takes the same share that it would have done

if the father had died intestate; or, in other words, the will is absolutely revoked pro tanto, unless there is some provision made for such child, or an express intention that it should receive nothing.

"The statute of Wisconsin is identical with that of Nebraska, and in *Bresee v. Stiles*, 22 Wis. 120, the inquiry ⁴⁸⁴ as to the testator's intentions was declared to be limited to the language of the will, and, the will being silent, the after-born child inherited. See, among many cases, the following, which show how carefully the courts have enforced the rule of revocation pro tanto in the interest of the child: *Waterman v. Hawkins*, 63 Me. 156; *Walker v. Hall*, 34 Pa. St. 483; *Hollingsworth's Appeal*, 51 Pa. St. 518. In the first the testator left certain real and personal estate to his widow during her life and widowhood, to revert to his heirs upon her death or marriage, and gave the rest to his father. A daughter born two months after his death was held unprovided for by the will, and recovered the share of the estate she would have taken if he had died intestate. In the second the testator gave his entire estate to his wife, saying in the will, 'Having the utmost confidence in her integrity, and believing that, should a child be born to us, she will do the utmost to rear it to the honor and glory of its parents'—and the same ruling was made. In the last case the will in terms committed any after-born child to the guardianship of his wife, adding, 'Which guardianship I intend and consider a suitable and proper provision for such child,' and still a similar decision was pronounced. Further citations would seem unprofitable.

- "To sum the matter up, the common-law courts of England finally reached the conclusion that the revocation was absolute upon the happening of marriage and birth of issue, and not dependent upon evidence of testator's intention. The general tendency of statute law in this country is in the same direction, and courts, as a rule, have carefully protected the rights of after-born children. The language of the statute is plain and unambiguous. The will makes no provision for this child, does not mention or refer to her, and on its face manifests no intention that she should be unprovided for. Hence, it must be held that she takes the same share in the estate which she would have taken had her father died intestate, to wit, one-half."

In passing this statute, the legislature required, if the father intended to disinherit the unborn child, he should indicate it

in his will, and that it should not be left to extraneous testimony to show his intent.

The decree of the court below as to Harry Snow and Gertrude Snow is reversed, and a decree will be entered here giving to them the same interest they would have in ⁴⁹⁵ the property if the father had died intestate. As to Clara L. Snow, the decree will be without prejudice to take proceedings at law to decide whether the omission to make provision for her was intentional. As all the parties were interested in the construction of this will, the costs should be paid out of the estate.

The other justices concurred.

WILLS—REVOCATION—MARRIAGE AND BIRTH OF ISSUE. While the marriage of a man did not alone, at common law, revoke a pre-existing will, there is no doubt that the marriage, whether of a man or of a woman, if followed by the birth of issue, did revoke his or her will: Extended note to *Graham v. Burch*, 28 Am. St. Rep. 339.

WILLS—OMISSION OF AFTER-BORN CHILDREN.—In very many of the states and territories, statutes have been passed providing that when any testator omits in his will to provide for any of his children, or for the issue of any deceased child, such child or issue shall take the same share to which it would have been entitled if the decedent had died intestate, unless it shall appear that such omission was intentional and not by mistake or accident: Extended note to *Wilson v. Fosket*, 39 Am. Dec. 740. See, also, *In re Atwood*, 14 Utah, 1, 60 Am. St. Rep. 878.

WILLS—PRETERMITTED HEIR—QUESTION FOR JURY. When an heir at law has been omitted from the will of his ancestor, the question whether or not the omission to provide for such heir was intentional or unintentional, and due to accident or mistake, is one of fact, which the pretermitted heir has a right to have submitted to a jury, and a verdict in his favor is conclusive, if the testimony offered has any legal tendency to support the conclusion reached: *Estate of Stebbins*, 94 Mich. 304, 34 Am. St. Rep. 345. The Michigan rule is not universal, however, and in some states it is held that evidence is inadmissible to show whether or not a testator's omission of any of his children or their issue was intentional, and that the question must be determined by the will itself: Notes to *In re Atwood*, 60 Am. St. Rep. 883; *Wilson v. Fosket*, 39 Am. Dec. 743.

BURRIDGE v. DETROIT.

[117 MICHIGAN, 557.]

MUNICIPAL CORPORATIONS.—The fact that the control of a city boulevard is vested by statute in the board of commissioners of parks and boulevards, rather than the common council, does not make the boulevard any less a city enterprise. A city may act through such agencies as the legislature directs.

STATUTES—LEGISLATIVE CONSTRUCTION.—A legislative construction of previous legislation is entitled to be considered by a court in construing such legislation.

MUNICIPAL CORPORATIONS—LIABILITY FOR BOULEVARDS.—A boulevard which furnishes to the traveling public all the conveniences of an ordinary street, and is equally inviting to the public, although an unusual space on either side is devoted to lawn, is a street or highway, within the meaning of a statute fixing the liability of municipal corporations for injuries received upon any public highway or street by reason of defective sidewalks.

Case for personal injuries caused by a defective sidewalk.

E. H. Sellers and Cassius Hollenbeck, for the appellant.

C. D. Joslyn, for the appellee.

557 MONTGOMERY, J. As the record shows, the sole question in this case is whether the city of Detroit is liable to respond to a person injured by reason of a defective sidewalk on the boulevard. The learned circuit judge was of the opinion that no such liability exists, and stated his reasons therefor in his charge, from which we quote. Referring to act No. 264 of the Public Acts of 1887 (3 Howell's Statutes, sec. 1446c et seq.), fixing liability of municipalities for defects in ways, including sidewalks, he said:

"It seems to me very clear that this law applies to public highways where the city or the village or the township ⁵⁵⁸ has control over them, and has neglected to do what it should have done to put them in proper condition for public travel. Now, let us see whether or not the boulevard of the city of Detroit is, according to the spirit of this act, and according to the letter of this act, a public highway. The boulevard of the city of Detroit was under the control of officials appointed by the township and by the city, because at that time, when it was first laid out, it was partly outside of the limits of the city; and that act contained an express provision that the municipal corporations concerned should not be responsible for the neglect of these commissioners, so that, if the act stated now as it did then, there could be no question. But in 1889 that law was

changed, because in the meantime the boulevard had been entirely taken in the city, and it was the opinion of the legislature that some other body than the body then in existence should take care of it. By that act a park and boulevard commission was created, to be appointed by the mayor, and whose appointments were approved by the council. Now, that act gives to those commissioners the control of these boulevards, or this boulevard, as well as the parks. It gives this commission the power to make rules and regulations as to the sidewalks, and as to their width and location, and power to prescribe the material of and manner in which they shall be constructed. In other words, these commissioners have vested in them by this act the power to determine what kind of sidewalks shall be made, and the power to determine when those sidewalks shall be repaired; so that the city has not any direct authority over the making of sidewalks in the first instance, or over their repairs subsequently. Neither has the city reserved to it by this act any power of exercising any direct supervision over these walks. The park and boulevard commission has just as much authority within its proper jurisdiction as has the common council, so that the city of Detroit has no right of its own volition to in anywise control these sidewalks. In other words, we cannot suppose that the legislature intended to make the city of Detroit responsible for the care of something when it has not the power to remedy it, and that would be the effect of extending this law to it. Of course, it may be said that equitably there would be just as much reason for it. Perhaps that is true."

We think the circuit judge was at fault in his premises. In 1889, by an act entitled, "An act supplemental to the ⁵⁵⁹ charter of the city of Detroit," et cetera, the control of the boulevard was placed in the hands of the commissioners of parks and boulevards: Act No. 388, Local Acts 1889. [This was a city agency, and it is error to assume that because the control of the boulevard was vested in such a body, rather than the common council, the enterprise was any the less a city enterprise. The city may act through such agencies as the legislature directs: *People v. Hurlbut*, 24 Mich. 69, 9 Am. Rep. 103; *Turner v. Detroit*, 104 Mich. 326; *Robinson v. Detroit*, 107 Mich. 168; *Barnes v. District of Columbia*, 91 U. S. 540.

Was the boulevard a "street" or "highway," within the meaning of this act? At the point where plaintiff received her injuries, it is about one hundred and fifty feet in width, about sixty feet of which are graded. The remainder of the space is

occupied by grass plots and sidewalks. At the time of the injury in question, the graded portion was open to travel without distinction. Since that time heavy teaming over this way has been prohibited. It is worthy of note that in 1893 the legislature added a section to the "boulevard act," so called, in which it was provided that, in case of a recovery against the city because of the dangerous condition of a sidewalk, a recovery might, under certain conditions, be had against the abutting owner: Act No. 415, Local Acts 1893. While the circuit judge justly observes that the fact that the legislators thought the law was in a certain condition does not make the law that way, unless as a matter of fact they were correct in the views they held, yet a legislative construction of previous legislation is entitled to more or less weight with the judiciary; and in this case we are inclined to adopt the same view that the legislature apparently entertained. Certainly, this boulevard had all the characteristics of a highway. It furnished all the conveniences of a street to the traveling public which an ordinary street offered, and it was equally inviting to the public. The fact that more than the usual space was devoted to lawn on either side ⁵⁶⁰ distinguished it from the ordinary street only in degree. While no cases are cited distinctly covering this question, we think the boulevard falls within the general description of a street or highway: Elliott on Roads and Streets, 1, 13. It has generally been referred to by this court as a street: Commissioners etc. of Detroit v. Detroit etc. Ry. Co., 93 Mich. 59; Commissioners etc. of Detroit v. Chicago etc. Ry. Co., 91 Mich. 292.

The judgment will be reversed and a new trial ordered.

The other justices concurred.

MUNICIPAL CORPORATIONS—STREET COMMISSIONERS.

A board of street commissioners of a city act in a ministerial capacity, and are individually liable for injuries to a person caused by the negligence of their employés in repairing and constructing a bridge; and the city itself is not liable where, instead of letting the work by contract to the lowest bidder, as required by the charter of the city, they resolve to do the work themselves, under the supervision of their committee and a superintendent appointed by them: Robinson v. Rohr, 73 Wis. 436, 9 Am. St. Rep. 810. That the municipal corporation is generally liable, however, see Meares v. Wilmington, 9 Ired. 73, 49 Am. Dec. 412.

STATUTES—CONSTRUCTION BY DEPARTMENTS OF GOVERNMENT.—Where the legislature, in framing a statute, employs language similar in its import to the language of other acts which have received a practical construction by the executive department and by the legislature itself, it is fair to presume that the language

was used in the latter act with a view to the construction as given in the earlier: *State v. Moore*, 50 Neb. 88, 61 Am. St. Rep. 538.

MUNICIPAL CORPORATIONS.—LIABILITY where only part of a wide street is kept in repair: *McArthur v. Saginaw*, 58 Mich. 357, 55 Am. Rep. 687.

COX v. CAYAN.

[117 MICHIGAN, 599.]

NEGOTIABLE INSTRUMENTS—MORTGAGE AND NOTES.
A mortgage of real estate, and the promissory notes secured thereby, are negotiable.

MORTGAGES — ASSIGNMENT — NOTICE TO MORTGAGOR'S AGENT.—Where all the business pertaining to a mortgage of a married woman's property is transacted by her husband as her agent, notice to him of the assignment of the mortgage constitutes notice to her.

Smith, Nims, Hoyt & Erwin, for the complainant.

Turner & Turner, for the respondent.

900 HOOKER, J. In 1885, Mason deeded the property involved in this suit to Beate Cayan, at the instance of her husband, William Cayan, and they gave Mason their notes, secured by a mortgage upon the premises, for a portion of the purchase price. In 1891 four new notes, for three hundred and fifty dollars each, and a new mortgage were given to take the place of the old. They were dated September 1, 1891, and the notes were payable in two, three, four, and five years, respectively, with interest at seven per cent. Notes were also given for the interest. Under the decision in the case of *Wilson v. Campbell*, 110 Mich. 580, these were negotiable instruments. On November 10, 1891, Mason delivered the notes and mortgage to the complainant as collateral security for a note of his own for two thousand dollars, accompanying them by an unconditional assignment of the notes and mortgage. In July, 1894, Mason took up his two thousand dollar note, paying in part therefor with the notes and mortgage already pledged as collateral. At this time the assignment was placed on record. There was evidence tending to show, and the circuit judge found, that notice was given to William Cayan, in 1891, of the assignment of this mortgage. The two notes first falling due were paid or adjusted between Mason and Cox in 1897. Mason testifies that he charged Cayan with the amount. Cayan paid

the interest on the three notes last falling due to Mason and his bookkeeper until 1894, when, according to his testimony, he first received notice from Cox that he was the owner. Subsequently, he paid some interest at the bank, taking up the coupons or interest notes. This suit is a foreclosure.

The defendants claim that, at the time the first mortgage was given, it was agreed orally between Mason and Cayan ⁶⁰¹ that the latter should pay the interest in money, and that the principal might be paid in clothes and tailor work, and that this was renewed when the second mortgage was given. Cayan testifies that he was conducting the clothing business for his wife, and it is obvious that he transacted all of the business pertaining to the mortgage. The circuit judge granted a decree as prayed, and the defendants have appealed.

Counsel for the defendants contend: 1. That the notes were not negotiable, and therefore complainant took the notes subject to the equities existing between the defendants and Mason; 2. That Mrs. Cayan never had notice that the complainant owned the mortgage, and that notice to her husband did not bind her, as he was her agent only for the purpose of paying the notes. We have already said that the mortgage and notes were negotiable, and we agree with the learned circuit judge that the evidence shows that notice of the assignment to the complainant was given to Mr. Cayan in 1891, and that his agency was such that it was equivalent to notice to his wife: *Leland v. Collver*, 34 Mich. 418, 427.

The decree is affirmed with costs.

The other justices concurred.

MORTGAGES AND NOTES SECURED THEREBY, executed at the same time and as one transaction, are to be construed together, and, so far as possible, as one instrument: *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261, and note.

MORTGAGES—ASSIGNMENT—NOTICE.—Actual notice to the mortgagor of the assignment of a mortgage is essential to the completion of the contract relations between the assignee and the mortgagor: *Foster v. Carson*, 159 Pa. St. 477, 39 Am. St. Rep. 696, and note. The authorities on the question, however, are in conflict: *Extended note to Vanbuskirk v. Hartford etc. Ins. Co.*, 36 Am. Dec. 475.

CHAPEL v. CLARK.

[117 MICHIGAN, 63.]

ARCHITECTS—CARE AND SKILL REQUIRED.—When an architect, in the preparation of plans and specifications, has exercised that degree of care, skill, and judgment common to his profession, he has done all that the law requires. He is not then liable for damage caused by defects in his plans.

RECEIPTS—EXPLANATION BY PAROL.—Where, in assumpsit for services as an architect, defendant puts in evidence a written receipt in full given him by plaintiff, and there is a clear conflict in the evidence as to the circumstances under which, and the reasons for which, the receipt was given, the plaintiff claiming that in view of such circumstances and reasons, the receipt should be denied effect as such, the question becomes one for the jury to determine.

Assumpsit for services as an architect. Plaintiff, under a parol arrangement, executed plans and specifications for defendant for a large building. Plaintiff claimed an express agreement, on the part of defendant, to pay him for his services, while defendant testified that plaintiff agreed to do the work without charge because of its value as an advertisement.

Wolcott & Perkins, for the appellant.

McKnight & McAllister, for the appellee.

630 GRANT, C. J. 1. Defendant requested the court to instruct the jury that if they found the contract as claimed by plaintiff, and they should further find that, by mistake of the plaintiff, the defendant had been caused unnecessary expense in the construction of the building, they should determine the amount of such unnecessary expense, and deduct it from the value of the services rendered. This was refused, and the court instructed the jury as follows: "The notice of defendant, which I have called your attention to, alleges that the plans and specifications drawn by the plaintiff were unskillfully drawn, whereby the alleged damages resulted. A person who holds himself out to the public in a professional capacity holds himself to be possessed of average ability in such profession, and the law implies that he contracts with his employer: 1. That he possesses that requisite degree of learning, skill, and experience which is ordinarily possessed by the profession in the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such busi-

ness; 2. That he will use reasonable and ordinary care and diligence in the exercise of his skill—in the application of his knowledge—to accomplish the purpose for which he is employed; 3. In stipulating to exert his skill and apply his diligence and care, an architect, like other professional men, contracts to use his best judgment. If you shall find that the plaintiff was qualified to that degree which the law required him to be in his profession, then the question as to whether or not he did the work unskillfully is a question which you are to determine under the rule I have just given you. If he made any mistakes by which the defendant was damaged, and it was through negligence or from incapacity, he is liable for such alleged specific damages as you may find from the evidence grew out of such negligence or incapacity. If, from a mistake growing out of the exercise of his best judgment, he possessing the reasonable degree of learning, skill, and experience in his profession required by law or implied by law, then, in such case, he would ⁶⁴⁰ not be liable for any damage resulting therefrom. A mistake in judgment does not excuse negligence or ignorance.”

The request does not correctly state the law. It makes the architect a warrantor of his plans and specifications, although they might be justified by the knowledge and experience of those ordinarily skilled in the business. The law does not imply such a warranty, or the guaranty of the perfection of his plans. The result may show a mistake or defect in them, although he may have exercised the reasonable skill required. Plans, now considered safe, experience and advanced knowledge of the science may hereafter show to be unsafe. The law requires only the exercise of ordinary skill and care, in the light of present knowledge: *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 460; *Shipman v. State*, 43 Wis. 381; *Smothers v. Hanks*, 34 Iowa, 286, 11 Am. Rep. 141; 2 Am. & Eng. Ency. of Law, 2d ed., 818. The above authorities seem to hold that the responsibility of an architect does not differ from that of a lawyer or physician. When either possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all that the law requires. The question was, Had plaintiff exercised that degree of care and skill and that judgment which are common to the profession or business? The defects alleged to exist in the plans were in the construction of the sewer, the cornice and coping for the towers, the stairway and elevator, and the flue of the chimney. If

the plans and specifications for these parts of the building were justified by the common knowledge upon such matters at the time, and met the judgment and approval of those then ordinarily skilled and experienced in their construction, the plaintiff had complied with his contract. We think that the jury must so have understood the instructions.

2. Plaintiff gave defendant the following receipt:

“Grand Rapids, Mich., Dec. 8, 1894.

“I hereby acknowledge full payment and satisfaction ⁶⁴¹ for all services heretofore rendered, or hereafter to be rendered, in and about the preparation of plans for the business block to be built by M. J. Clark on South Ionia street, and in looking after the building of said block, to its completion.

“W. A. CHAPEL.”

Error is assigned upon the following instruction: “If the circumstances under which the receipt, so called, was given by the plaintiff, were as testified to by the plaintiff, it was given at the request of the defendant, under a promise by him that, as between them, it was to have no effect, and the defendant would, in fact, pay to plaintiff all that his services should be worth—‘would pay him well for his services,’ in his own language.”

The objection is that there was no testimony on which to base the instruction. The case evidently was tried by both parties upon the theory that this receipt was open to explanation. Plaintiff testified that defendant, just before leaving home for California, asked for this receipt, saying that it would make no difference with their agreement, and that he was going to pay him well for his work. There was a clear dispute as to the circumstances and reasons for giving this receipt, which made it a proper subject for the determination of the jury.

3. Several errors are assigned upon the admissibility of testimony. We find nothing in this testimony which we think was prejudicial to the defendant.

Judgment affirmed.

The other justices concurred.

ARCHITECTS—RESPONSIBILITY OF.—The undertaking of an architect implies that he possesses skill and ability, including taste sufficient to enable him to perform the required services at least ordinarily and reasonably well, and that, in a given case, he will exercise his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be

by the fault of the architect, and there is no implied promise that miscalculations will not occur: *Coombs v. Beede*, 89 Me. 187, 56 Am. St. Rep. 406, and note.

RECEIPTS—EXPLANATION BY PAROL.—A receipt in full of all demands is prima facie evidence of a settlement between the parties, and of the payment of the balance: *Reid v. Reid*, 2 Dev. 247, 18 Am. Dec. 570. A receipt in full for money is not conclusive evidence, and parol evidence of a mistake may be given: *Ensign v. Webster*, 1 Johns. Cas. 145, 1 Am. Dec. 108; *Tucker v. Baldwin*, 13 Conn. 136, 83 Am. Dec. 384.

WATTLES v. WAYNE CIRCUIT JUDGE.

[117 MICHIGAN, 662.]

GARNISHMENT—FOREIGN JUDGMENTS.—An action brought upon a foreign judgment is an action upon contract within the meaning of a statute authorizing the issuance of garnishment process in all personal actions arising upon contract.

JUDGMENTS AS CONTRACTS.—Judgments are classified as contracts with reference to remedies upon them.

GARNISHMENT.—AN AMENDMENT OF AN AFFIDAVIT for a writ of garnishment is properly allowed for the purpose of correcting a clerical error in the date thereof.

GARNISHMENT—WHAT SUBJECT TO.—Nothing can be reached in the hands of a garnishee having its origin in transactions subsequent to the issuance of the writ of garnishment.

J. A. McLennan, for the relators.

Griffin, Clark & Russell, and L. T. Griffin, for the respondents.

⁶⁶² LONG, J. May 27, 1897, Levi T. Griffin commenced suit in the Wayne circuit court against Greenleaf C. Wattles by summons issued out of said court. This summons was personally served on Wattles, within the county of Wayne, on June 3d, thereafter. On the last-named day, Griffin filed in said court an affidavit for a writ of garnishment in said cause, to be directed to Oliver H. Wattles. This affidavit states that the summons had been personally served on the principal defendant, in an action "to recover upon a judgment heretofore recovered on the twenty-first day of February, 1891, for the sum of three thousand seven hundred and two dollars and sixty cents, in the supreme court of the state of New York, . . . which is a ⁶⁶³ court of civil and general jurisdiction, a transcript of which said judgment, duly authenticated, deponent has filed in said circuit court for the county of Wayne." The affidavit then sets out that the garnishee defendant, Oliver H.

Wattles, residing in Lapeer county, has property, et cetera, in his hands, or under his custody or control belonging to the defendant Greenleaf C. Wattles; that Oliver H. Wattles is indebted to said Greenleaf C. Wattles; that there remains due and unpaid on said judgment three thousand seven hundred and two dollars and sixty cents, with interest; and that said Greenleaf C. Wattles is justly indebted to the said Griffin in the sum of five thousand one hundred dollars and twenty-two cents. Writ of garnishment was issued, and personally served on the garnishee defendant, who caused his appearance to be entered in said cause by J. A. McLennan. On June 19th, the garnishee defendant, by said McLennan, filed his disclosure in said cause, denying all liability. This disclosure was served on Griffin's attorneys, who filed a demand for an examination of the garnishee on oath, and served notice requiring him to appear before a circuit court commissioner of Wayne county on July 22, 1897, which notice was also duly personally served on Oliver H. Wattles.

The principal defendant appeared by his attorneys, Messrs. Moore & Goff. Declaration was duly filed in the cause, declaring on the judgment so rendered in the state of New York. The principal cause was tried on its merits, and verdict and judgment entered in favor of Griffin for five thousand two hundred and sixteen dollars and ninety-eight cents, on December 17, 1897. Execution was issued on said judgment, and returned unsatisfied.

In April, 1898, the attorney for the garnishee defendant made a motion in the cause in the Wayne circuit court to dismiss the garnishee proceedings, to quash the writ of garnishment, and discharge the garnishee defendant for the reasons: 1. That the court had no jurisdiction to issue the writ of garnishment, and had no jurisdiction over the garnishee defendant; 2. That a former suit is pending in the county of Lapeer. This motion was denied by respondent. Mandamus is now asked to compel the respondent ⁶⁶⁴ to set aside said order, and enter an order quashing said writ of garnishment. An order to show cause having been made in this court, the respondent has made his return thereto, as follows: That the suit was commenced by summons; that the declaration was upon a New York judgment; that his declaration was afterward amended by adding the common counts in assumpsit.

It is the claim of counsel for the garnishee defendant that the statute does not authorize the issuing out of a writ of gar-

nishment in the present case, as the action does not arise upon contract, but is upon a foreign judgment. Act No. 73 of the Public Acts of 1889 (3 Howell's Statutes, sec. 8058), provides that: "In all personal actions arising upon contract, express or implied, brought in the several courts or municipal courts of civil jurisdiction, whether commenced by declaration, writs of *capias*, summons, or attachment, and in all cases where there remains any sum unpaid upon any judgment or decree rendered in any of the several courts hereinbefore mentioned, or upon any transcript of a judgment filed in said courts, if the plaintiff, his agent or attorney, shall file with the clerk of said circuit court . . . an affidavit, . . . a writ of garnishment shall be issued."

But counsel for the garnishee contends that this clause refers solely to justices' judgments, and not to foreign judgments. Whether this statute must be so construed we need not now determine, as we are of the opinion that an action brought upon a foreign judgment is an action upon contract, within the meaning of this statute. It is said by Story, in his work on Contracts, section 2, that contracts are divided into three classes: "1. Contracts of record, such as judgments, recognizances, and statutes staple; 2. Specialties, which are contracts under seal, such as deeds and bonds; 3. Simple contracts, or contracts by *parol*."

We are aware that in several cases it has been held, ~~as~~ under the peculiar facts of the case, that the word "contract" does not include a judgment; but it is apparent from the cases that judgments are invariably classified with contracts with reference to remedies upon them. In *Meyer v. Brooks*, 29 Or. 203, 54 Am. St. Rep. 790, the question arose under the statute in reference to the remedy by attachment; and it was held that a judgment for money creates a legal obligation on the part of defendant for its payment, and an action on such judgment is one upon a contract, express or implied, within the meaning of the statute authorizing attachment in such actions. This same rule of construction was also laid down in *Gutta-Percha etc. Mfg. Co. v. Houston*, 108 N. Y. 276, 2 Am. St. Rep. 412; *Childs v. Harris Mfg. Co.*, 68 Wis. 231; *First Nat. Bank v. Van Vooris*, 6 S. Dak. 548.

It is next contended that the court had no jurisdiction, because the affidavit for the writ of garnishment was dated June 3, 1895. It was made to appear that this was a clerical error; that the affidavit was in fact sworn to on June 3, 1897; and the

date of the year was permitted to be amended. The record itself showed that it was a clerical error, and it was properly amended: *Emerson v. Detroit Steel etc. Co.*, 100 Mich. 127.

The point made that there is a former suit pending in the Lapeer circuit court has no force. Nothing could be reached in the hands of the garnishee which had its origin in transactions subsequent to the issuing of the writ of garnishment.

The writ of mandamus must be denied, with costs against relators.

Grant, C. J., and Montgomery and Hooker, JJ., concurred.

Moore, J., did not sit.

ATTACHMENT—JUDGMENTS AS CONTRACTS.—A judgment is a contract for the direct payment of money within the meaning of the attachment laws. Hence an attachment may properly issue in an action thereon: *Meyer v. Brooks*, 29 Or. 203, 54 Am. St. Rep. 790, and note.

ATTACHMENT—AMENDMENT OF AFFIDAVIT.—The affidavit for attachment sworn to before a notary public, who is the attorney for the plaintiff in the action, is only voidable, and may be amended. An amendment to a petition for attachment varying the date on which the original petition alleged that the debt was due will not vitiate the attachment: *Note to Bunneman v. Wagner*, 8 Am. St. Rep. 811. An affidavit for attachment is not vitiated by mere clerical errors: *Whipple v. Hill*, 36 Neb. 720, 38 Am. St. Rep. 742, and note.

ATTACHMENT—WHAT SUBJECT TO.—Attachment process operates only upon such interests of the debtor as exist at the time it is served, and not on such as may afterward arise: *Arrington v. Screws*, 9 Ired. 42, 49 Am. Dec. 403.

AM. ST. REP., VOL. LXXII.—66

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STATE v. NORD.

[78 MINNESOTA, 1.]

TAXES—SALE—NOTICE OF TIME FOR REDEMPTION.—The statutory notice of the time within which a redemption may be made from a sale of land for delinquent taxes must be given, or served, in order to terminate the right to redeem.

TAXES—SALE—NOTICE TO REDEEM—SUFFICIENCY OF.—A statute providing for notice of the time when the right to redeem from a tax sale expires is mandatory, and such time must be stated clearly and correctly in the notice. The time prescribed by law must be inserted in the notice. Hence, if the time fixed in the notice is ninety days, when the statute prescribes sixty, the notice is defective and invalid, for no distinction can be made between a notice which extends the time and one in which the time is reduced.

Appeal by the relators, Kipp and another, from an order sustaining the demurrer of the defendant Nord, county auditor, to an alternative writ of mandamus and denying a peremptory writ.

S. & O. Kipp, for the appellants.

P. H. Stolberg, for the respondent.

■ **COLLINS, J.** General demurrer to the petition upon which was issued an alternative writ of mandamus directing defendant county auditor to permit the relators, who alleged themselves to be the fee simple owners of certain tracts of land, to redeem the same from a tax sale made under and by virtue of the provisions of the Laws of 1893, chapter 150: See Gen. Stats. 1894, p. 429, note. From the petition it appeared that the relators' right so to redeem was denied by the auditor on the

ground that notice of the expiration of the period of redemption had been duly given and received, and the time to redeem had expired. The court below sustained the demurrer, and relators appeal.

1. It is argued by defendant that no notice to redeem lands sold under the provisions of the 1893 statute was necessary. The scheme of the law under consideration was to enforce the collection of taxes which became delinquent in the several counties of this state in and prior to the year 1889, by a public sale in each county on October 12, 1893. The 1893 statute contains no express requirement that the general law (Gen. Stats. 1894, sec. 1654) shall be observed, ³ and the notice therein prescribed shall be given or served as to the lands so to be sold, and there are several provisions in the act which, construed independently of one found in the latter part of section 5, might lead to the conclusion that the notice to redeem above referred to is not essential, and that it need not be given or served in order to confer a fee simple title in the purchaser at the sale, subject simply to the right of the owner to redeem within one year. But it is provided in that part of the section just mentioned that the certificate issued to the purchaser, and which constitutes his muniment of title, "may be recorded as deeds of real estate after ninety days have elapsed from the service of notice of redemption from tax sale as now provided by law," and some force and effect must be given to these words. They were inserted for the benefit of the landowner or redemptioner, and not merely as a wholly useless regulation in reference to the recording of certificates. We cannot ignore them, and this would be the inevitable result, unless we hold that in this unsuitable place in the law, and in this awkward manner, the legislature expressed its intent to fasten upon the 1893 act the then existing general law in respect to notice to redeem—the notice "as now provided by law."

Of course, a direct provision, independent of all reference to the recording of certificates of sale, would have better served the purpose; but, unfortunately, much legislation is crude, and frequently the different parts of statutory enactments are badly put together. The act in question is an example of a badly considered and defectively constructed statute. Recognizing the frequently announced rules for the construction of statutes, we are obliged to hold that the general law is applicable, and that the statutory notice of the time within which redemption is to be made must be given and served in order to terminate

the right, and secure absolute title to lands sold under the provisions of chapter 150 of the Laws of 1893.

2. The second point made by respondent's counsel is that the notice which was given by service upon the persons in possession of the land (strangers to relators' title), in the absence from the county of the person named in the notice and in whose name the ⁴ land was assessed, was sufficient, under section 1654 of the General Statutes of 1894. The defect in the notice relied upon by relators is that it was therein stated that the time for redemption would expire in ninety instead of sixty days after service of the notice and proof of such service had been filed.

The statute providing for this notice is mandatory, and the time when the right to redeem expires must be stated clearly and correctly in the notice. There must be strict compliance, and the auditor cannot depart from the statutory requirements. He cannot substitute provisions of his own for those specified in the law under which he prepares the notice, and it is the law which determines the time or period of redemption to be inserted in the notice, not the county auditor. The courts cannot condone a material departure from a statute of this importance, or overlook an irregularity so great in proceedings which may end in the divestiture of property. The time fixed in the notice was ninety days, when the statute prescribed sixty. The period within which to redeem was enlarged, to be sure, but in principle this can make no difference. No distinction can be made between a notice which extends the time and one in which the time is reduced: *Wisner v. Chamberlin*, 117 Ill. 568; *Benefield v. Albert*, 132 Ill. 665. In the case last cited the time was extended just one day by the notice: See, also, *Reed v. Lyon*, 96 Cal. 501, where the rule was applied in a case when the notice to redeem stated the amount required to be paid a single dollar too much; and *Black on Tax Titles*, secs. 329, 334; 2 *Blackwell on Tax Titles*, 5th ed., sec. 679. The notice was defective and invalid.

The order appealed from is reversed, and on remittitur the court below will direct that a peremptory writ issue as prayed for.

TAXES—NOTICE OF TIME FOR REDEMPTION.—Tax sales are not valid, unless every substantial requirement of the statute has been strictly complied with. Hence, if notice of the time when the right to redeem expires specifies a wrong day, it is void, and no valid deed can issue thereon: *Gage v. Davis*, 129 Ill. 236, 16 Am. St.

Rep. 260. Compare Hicks v. Nelson, 45 Kan. 47, 23 Am. St. Rep. 709. The right of redemption is governed by the law in force at the time of the sale, and the time for redemption can neither be shortened nor extended, even by subsequent legislation: Hull v. State, 29 Fla. 79, 30 Am. St. Rep. 95.

TAX SALES—REDEMPTION—NOTICE.—The right of redemption from a tax sale, and notice of the expiration thereof, must be governed by the law in force at the date of the sale. Hence, if the statute at that time provides that the time for redemption will expire "sixty days after the service of this notice," a notice of the expiration of the time for redemption, stating that the time will expire "sixty days after the service of this notice and proof thereof has been filed," is void, because it is not the notice required by law: Kipp v. Johnson, 73 Minn. 34. If the notice required by the statute is given, it is sufficient; but a notice to redeem, which is dated May 3, 1895, and which states that the tax sale of the land from which such redemption is required to be made was May 31, 1893, is void on its face, where the law permits a redemption at any time within three years from the date of the sale, because no such notice can be lawfully given until after three years from that date: Kipp v. Fitch, 73 Minn. 65.

STENDAL v. BOYD.

[73 MINNESOTA, 63.]

REAL PROPERTY—DANGEROUS PREMISES—INJURY TO CHILDREN—LIABILITY.—A LANDOWNER is not bound to fence or otherwise guard an open excavation or pond, natural or artificial, on his land, so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced so to do by the alluring attractiveness of such excavation or pond.

Walter L. Chapin, for the appellant.

John L. Townley, for the respondent.

54 START, C. J. Action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. Verdict for the plaintiff for four hundred dollars, and the defendant appealed from an order denying his alternative motion for judgment in his favor, notwithstanding the verdict, or for a new trial.

There is but little conflict in the evidence, and the facts (stating them as strongly for the plaintiff as the evidence will warrant) are substantially the following: The defendant since 1891 has been the owner of an uninclosed lot in the city of St. Paul, fronting forty feet on Canton street and extending back one hundred and thirty-six feet, situated in a populous part of the city, there being twenty-five families living within two hun-

dred and fifty feet of it at the time of the accident here in question. On each side of this lot there was a vacant lot. In the years 1891 and 1892, the defendant, in quarrying stone from his lot, excavated thereon a hole with perpendicular sides six or seven feet high, which came up to and under the sidewalk, and extended back some seventy feet. It was about twenty-eight feet wide at the sidewalk, and forty feet wide at a point thirty feet back from the street. This left a triangular tract on the north side of the excavation. So much of the excavation as was in the street was covered by the sidewalk, and was originally protected at the street line by a fence which had been broken down at the time of the accident. The excavation filled with water from natural causes, forming a pond attractive and dangerous to children, who were accustomed to go there to play. It had never been protected by a fence or otherwise, except on the street line. The defendant was notified that it was a dangerous place, and had been, previous to the accident, informed that a child had fallen into the pond.

On May 3, 1895, the plaintiff's intestate and son, four years ten months old, while playing with other children on the triangular piece referred to, and at a point twelve to fifteen feet back from the street, fell into the pond and was drowned. There is no evidence that the defendant invited or knowingly permitted the children to come upon his lot to play, or otherwise, except as may be implied from ⁵⁵ his knowledge that his lot, with the pond thereon, was an attractive and dangerous place for children. The condition of the fence along the sidewalk in front of the water on the street line is immaterial, in view of the fact that the child did not fall into the water from the sidewalk, where he would have had a right to be. The absence of this fence was not the cause of the child's death, proximate or otherwise, as the child was playing on the triangular tract north of the pond, which was unfenced and unprotected, when he fell into the water.

The rule that, if a landowner makes a dangerous excavation on his land adjoining a street or highway, into which a person rightfully in the street falls, the owner is liable, has no application to this case. It is sought, however, to hold the defendant liable upon the facts stated, upon the principle of the "turntable cases": *Keffe v. Milwaukee etc. Ry. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *O'Malley v. St. Paul etc. Ry. Co.*, 43 Minn. 289. The liability of a landowner to children who are induced to come upon his premises by reason of attractive and

dangerous machinery thereon was carefully limited in the original decision, and the limitations have been enforced by the subsequent decisions of this court. In the case of *Twist v. Winona etc. Ry. Co.*, 39 Minn. 164, 12 Am. St. Rep. 626, the opinion was expressed that the doctrine of the turntable cases ought not to be extended: See, also, *Haesley v. Winona etc. Ry. Co.*, 46 Minn. 233, 24 Am. St. Rep. 220; *Ratte v. Dawson*, 50 Minn. 450, and the opinion on the former appeal in this case, *Stendal v. Boyd*, 67 Minn. 279.

The doctrine of the turntable cases is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children? If he must fence in his stone quarry after it fills with water, so that children cannot reach it—⁵⁰ a well-nigh impossible task—why should he not be required to do it before, for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children? It would seem that there is no middle ground, and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery. But it is not necessary to a decision of this particular case to adopt any absolute limitation of the doctrine. A turntable case and the case at bar may be distinguished in many respects. In the case of *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, which was one where a boy had been drowned in an unguarded pond on private property, the court, in holding the owner not liable, at page 355 stated the distinction in these words: "A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Cer-

tainly, no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed." We are of the opinion that the doctrine of the turntable cases ought not to be applied to this case.

So far as we are advised, there is but one adjudged case in which the doctrine has been extended to a pond on private premises. The exception is the case of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, which fully sustains the contention of the plaintiff in the case at bar. The case of *Penso v. McCormick*, 125 Ind. 116, 21 Am. St. Rep. 211, also relied upon by the plaintiff's counsel, is not in point. That was a case where the landowner, after piling up a mound of ashes on his uninclosed lot, allowed it for months to be used as a thoroughfare and as a playground for children, and then removed some of the ashes, and replaced them with burning embers, which cooled on top, so as to look like the rest of the mound, but remained hot below; and he was held liable for the injury received by a child by stepping ⁵⁷ into the hot coals while passing across the lot. The ground of his liability was that he had permitted his lot to be used as a thoroughfare and a playground, and then created thereon a hidden peril or trap. With the exception of the case of *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, the courts of last resort, including those which recognize the doctrine of the turntable cases, have uniformly denied the liability of a landowner for injuries to trespassing children by reason of open and unguarded ponds and excavations upon his premises: *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557; *Richards v. Connell*, 45 Neb. 467; *Omaha v. Bowman*, 52 Neb. 293, 66 Am. St. Rep. 506; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Hargreaves v. Deacon*, 25 Mich. 1; *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365.

The plaintiff seeks to distinguish these cases from the one at bar on the ground that the children for whose death or injury a recovery was sought were much older than the plaintiff's intestate in this case. A recovery in the cases referred to was not denied on the ground of the capacity and contributory negligence of the children, but upon the broad ground that the landowner was not bound to make his premises safe for trespassing children. Upon the undisputed facts in this case, we hold that the plaintiff cannot recover, for the reason and upon the ground that a landowner is not bound to fence or otherwise guard an

open excavation or pond, natural or artificial, on his land, so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced so to do by the alluring attractiveness of such excavation or pond.

Order reversed and case remanded, with direction to the district court to grant the defendant's motion for judgment notwithstanding the verdict.

REAL PROPERTY—DANGEROUS PREMISES—INJURY TO CHILDREN—LIABILITY OF LANDOWNER.—It is not the duty of a landowner to keep his property in such condition that persons, whether children or adults, going thereon without his invitation may not be injured: *Dobbins v. Missouri etc. Ry. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856; *Moran v. Pullman etc. Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543. Another view is, that unguarded excavations supplied with dangerous attractions are regarded as holding out an implied invitation to children, which will make the owner of the premises answerable for injuries to them, even though they be technical trespassers: Note to *Dobbins v. Missouri etc. Ry. Co.*, 66 Am. St. Rep. 863.

PRINCIPLE OF THE "TURNTABLE CASES"—APPLICATION OF.—The supreme court of Minnesota seems to be committed to the doctrine that the principle of the "turntable cases" ought to be limited to cases of attractive and dangerous machinery, and that a landowner, whether an individual or a city, is not answerable for injuries to children by reason of other dangers on his premises, such as high walls upon which children may climb and fall, open and unguarded ponds and excavations, or crust, resembling ground, formed over a pond of deep water. Thus, the court refused to extend the doctrine of the "turntable cases," where a tenant's child was injured by falling from a retaining wall, seven and one-half feet high, situated at the rear of a space between one house occupied by the landlord and another house occupied by the tenant. The child climbed upon this wall while playing, fell off, and was injured, but the court held that though this open space was used by the children of the tenants as a playground, and that the injured child was in the yard by the invitation of the landlord, there was no liability on the part of the landlord. "It is true," said the court, "that if the owner of premises keeps upon them a concealed trap, and a person coming upon the premises by invitation is injured thereby, he may recover. But there was no mantrap in this case. The wall was plain to be seen. The child knew it was there, and fell off of it in the daytime. While the owner of premises may owe more duty to a child than to an adult coming upon his premises by implied invitation, yet he is not bound to guard every stairway, cellarway, retaining wall, shed, tree, and open window on his premises, so that a child cannot climb to a precipitous place and fall off": *Kayser v. Lindell*, 73 Minn. 123.

The court also refused to apply the doctrine of the "turntable cases" where a child met its death by falling through a crust on a slough used by a city as a dumping ground for garbage. The facts were as follows: Near the western bank of the Mississippi river, and within the city of St. Paul, was a slough, which filled with water during high water, and it had no outlet. The streets of the addition which included this slough were dedicated to the public, but were never opened, kept, or used as such by the city. In this slough was an open basin, contiguous to James street. The city

had for a long time used this hollow basin as a place for dumping garbage and manure, and during high water it floated upon the water and formed a crust, resembling solid ground, upon which vegetation grew, resembling that upon the surrounding land, but under which the water, at the time of the accident, was more than ten feet deep. The plaintiff's intestate, a girl ten years old, left James street, upon which she had been traveling, and, either for convenience or pleasure, and probably mistaking the surface of the hole or basin for solid ground, attempted to cross the crust, when it broke, precipitating her into the water, and she was drowned. It did not appear from the evidence that the public had ever traveled over this dumping ground or used it as an open common. The city kept a police officer as watchman to direct the public where to deposit the garbage and manure, and to warn persons of the danger of going upon this crust, but he was absent from his post when the accident complained of occurred. Upon this state of facts, the plaintiff claimed that the city was liable, and one of the grounds of this liability was claimed to be that the whole addition was an open common, and that the people had been accustomed to travel over it. But in the complaint there was another material allegation which greatly qualified this statement, namely, that this hole, slough, or basin where the accident occurred was used by the city not once or twice, but generally, as a dumping ground for garbage and manure, and that during the time of freshets and high water, this slough filled with water and became a deep pond.

"It seems to us," said the court, "that this general allegation, that it was an open common and traveled by the public, is so inconsistent with the specific allegations that the latter must control. It is self-evident that a basin or slough used as a dumping ground for the garbage and manure accumulating in a large city, and subject to be covered by water during every freshet or high water, without an outlet for such water, could not, in the very nature of things, be used as a public or open common. The repulsive features of the place and its surroundings all lead to the conclusion that it could not be used by the public for business, and certainly not for pleasure, but only for a dumping ground as above stated. Traveled paths could not well be formed over this accumulation of filth in low water, and in high water it was certainly unsafe, even for this young girl, only ten years old. Wherein and just how this slough was used by the public as an open common is not stated. Carriages could not well pass over it, and that pedestrians would use a garbage dumping ground and manure pile as a traveled path is clearly improbable. Hence, the allegation that it was an open common used by the public loses its force as an admission by the demurrer when we consider the other facts stated in the complaint. Not only is this so, but we consider it substantially untrue that this basin where the accident occurred was used by the public as an open common, over which there were traveled paths. This girl had been traveling along James street, turned therefrom, went upon this crust formation, and, when some twenty-five to thirty-five feet from said street, fell through this crust, and was drowned. She was not upon a public street, but had left it for the purpose of going to a packing-house about a quarter of a mile distant. This hole or basin was some fifty or sixty feet across each way, and when nearly in the center of it the accident occurred.

"We are of the opinion that the city is not liable under this state of facts. It does not appear that there was any invitation by the city for the girl to go upon this crust by reason of the manner the ground was used. The nature of the ground and the offensive material dumped there all tended strongly to show that the place was

not used, nor intended to be used, by the public for any purpose other than that stated in the complaint. It is quite evident that she left the public street for her own convenience or pleasure. The city was not using the ground for any purpose which would allure or entice an infant or adult to go thereon, and nothing of the kind was upon the premises.

"While it is alleged in the complaint that she followed a path from the levee down to and upon the crust so formed until she reached the middle thereof, where she was precipitated into the water, yet it is not alleged that it was a publicly traveled path, nor that it was ever traveled by any person whatever; and, when we consider the further allegation of the complaint that this crust was formed by the garbage and manure floating upon the water, we can readily understand the guarded language of the complaint in alleging that it was merely a path, without alleging it to be the one used and traveled by the public.

"Nor does it appear what possible inducement there could be for the public to leave the public street, and travel along a path over a floating garbage and manure pile, or upon ground notoriously used for such purpose. The city owed no duty of protection in respect to her going upon this dumping ground, or crust, as a traveler. Although it kept a watchman there generally, it was under no obligation to do so, and hence no liability arises by reason of his being absent at the time of the accident. It was performing a public corporate duty in removing garbage and manure from the business and residence parts of the city as a protection against disease.

"However sad may be the untimely death of this young girl, yet, under the facts and the well-settled rules of law, the order denying the defendant's motion for a new trial must be reversed. We have not deemed it necessary to discuss the authorities cited by either counsel, as the facts clearly demand a reversal of the order. It is sufficient to say that the rule laid down in the well-known 'turntable cases' has no application to the case at bar": *Dehanitz v. St. Paul*, 73 Minn. 385.

AULTMAN & TAYLOR COMPANY v. O'DOWD.

[73 MINNESOTA, 58.]

CROPS—MORTGAGED PREMISES—CROPS THEREON, TITLE TO.—If the owner of land mortgages and subsequently leases it, the lessee, who sows a crop before the expiration of the time for redemption under a foreclosure sale of the premises, and remains in possession after such sale, and cares for the crop, harvests it, and carries it off the premises in about a week after the redemption period has expired, and before there has been any entry upon the premises by the purchaser at the sale, has, as against such purchaser, a superior right to the crop.

JUDGES WHO HAVE NOT HEARD EVIDENCE CANNOT MAKE FINDINGS OF FACT.—If one judge presides at the trial of an action, another judge has no authority on a motion for judgment notwithstanding the verdict, to make findings of fact upon evidence not heard by him.

REPLEVIN—FACTS PROVABLE UNDER GENERAL DENIAL.—Although the defendant, in an action of replevin, does not claim a return of the property, he may, even under a general denial,

prove any facts which tend to show that the plaintiff is not entitled to the possession of the property.

REPLEVIN—AMENDMENT DEMANDING RETURN OF PROPERTY IS ALLOWABLE AT ANY TIME.—While a defendant, in an action of replevin, is not entitled to a return of the property unless he demands it, his answer may be amended at any stage of the case, and, when the plaintiff has obtained possession, such a demand in the answer will form a basis upon which a proper judgment may be entered.

Appeal by the plaintiff company from a judgment in favor of the defendants, O'Dowd and another, entered in pursuance of the order of Powers, J., the terms of which are stated in the opinion.

Charles G. Laybourn, for the appellant.

R. T. Daly, for the respondents.

⁵⁰ **BUCK, J.** This action was brought to recover a crop of oats and wheat grown on eighty acres of land in Renville county during the year 1895. Before the action was commenced, the defendant Nelson had sown, grown, harvested, and threshed this grain, and removed two-thirds of the same to a granary on his own land. Prior to sowing and raising this grain, the land was owned by one William Grady, who gave a mortgage thereon to Albert Brown, dated December 6, 1889, who assigned it to A. V. Reynolds June 10, 1891; and, there being a default in the payment of the sum thereby secured, Reynolds foreclosed the mortgage, and at the foreclosure sale, on July 9, 1894, purchased the same, and took the sheriff's certificate of such sale in her own name, which subsequently and on February 11, 1895, she assigned to plaintiff, the Aultman & Taylor Company, a corporation located in the state of Ohio.

While Grady owned the land, and on September 30, 1893, by an instrument in writing, he leased the premises to Nelson for the ⁶⁰ farming seasons of 1894 and 1895, commencing September 30, 1893, and ending September 1, 1895. By the terms of the lease, Grady was to have one-third of the crop raised, and Nelson the other two-thirds. In the absence of Grady, O'Dowd acted as his agent, and, after the grain was threshed, took one-third of the crop off the premises, and had this amount in his possession, by consent of Nelson, at the time when this action was commenced. From the confused state of the record, it is difficult to determine the number of bushels of wheat or oats, or their value, but it sufficiently appears that there were several hundred bushels of each kind of grain. Just why a joint action was brought against the parties does not appear.

The time for redemption under the foreclosure sale expired July 9, 1895; and the crops, which long previous to that time had been sown by Nelson under his lease with Grady, were harvested about July 15, 1895, and removed from the premises before this action was commenced. The question, then, is for the first time squarely presented in this court, as to who has the superior right to the crops sown by a tenant before the expiration of the time for redemption—the purchaser at the foreclosure sale, or the lessee who remains in possession of the premises after such sale, and who cares for the crops, harvests them, and carries them off the premises before the owner of the land takes possession thereof.

We are fully aware of the decisions in several other courts holding that where the owner of land mortgages it, and subsequently leases it, the lessee is not entitled to growing crops, as against the purchaser at the foreclosure sale, where the time for redemption expires before the maturity of the crops. These decisions are based upon the general rule of the common law that the crops are part and parcel of the realty, and belong to the owner of the land. In the case at bar, there had been no entry upon the premises by the owner, or the purchaser at the mortgage foreclosure sale. That the crop was sown and raised after the foreclosure sale, and the foreclosure papers duly recorded, and Nelson apprised thereof and notified before the sowing of the crops of 1895 that the plaintiff, in case the title should ripen in it under the foreclosure, would claim the crop, does not aid it, because it tends to place Nelson in the ⁶¹ light of a wrongdoer, and as holding the premises wrongfully after the expiration of the period of redemption. In the case of *Woodcock v. Carlson*, 41 Minn. 542, it was said, at page 546, that: "It is the settled rule in this state that, with respect to crops which are the result wholly of the labor of the disseisor, and which he has severed and removed from the premises while still in possession, the title is in him, and that the sole remedy of the owner of the land is his action for mesne profits: *Lindsay v. Winona etc. Ry. Co.*, 29 Minn. 411, 43 Am. Rep. 228."

It is difficult to see why, on principle, a more severe rule should be applied to a mortgagor, or his grantee or lessee, who holds over after the expiration of the redemption period, than is applied to a disseisor, whose entry was a willful trespass. If Nelson was not, in the strict definition of the term, a disseisor or trespasser, he was at least a wrongdoer, in holding over after the period for redemption had expired; and plaintiff then had

his remedy to oust him by an action of ejectment. But if Nelson continued in possession of the premises, and during such time the crops had matured, been harvested, and removed from the premises by him, plaintiff would not have been entitled to the crops, or their value, but would be entitled to the rental value of the premises, for defendants' withholding them. The same rule would apply if plaintiff had proceeded by an action of forcible detainer, under the General Statutes of 1894, section 6118, which provides for such action against any person who holds over on the foreclosure of a mortgage by advertisement, and after the expiration of the time for redemption, although damages for withholding the premises might not be recovered in this form of action. Each action, in such case, would proceed upon the theory that the defendant was wrongfully withholding the premises, but his rights would be at least equal to those of a willful trespasser; and, if the latter sows and gathers crops, he is the owner of them, even as against the owner of the land: *Lindsay v. Winona etc. Ry. Co.*, 29 Minn. 411, 43 Am. Rep. 228.

The fact that the owner of the premises may recover the rents and profits of the land for its being withheld precludes the idea of his right to recover the crops. It is the value and use of the land which the owner recovers, and not the fruits of the land. A contrary ⁶² rule would give the owner the value of the use of the land, and the value of the labor of the farmer in producing the crop, for the crop contains the value of both. In this case, not only did Nelson sow and care for the crop before plaintiff became the owner of the land, but he continued in possession of the same thereafter, and was permitted to harvest and thresh it, and remove the same to his own granary. It would be an oppressive rule to permit the plaintiff to remain inactive while all this was going on, and Nelson adding thereby to the gross value of the crop he had raised in the course of months of husbandry, and then deprive him of the entire property. We sanction no such rule.

Several questions have also been raised as to the proceedings during and subsequent to the trial. When the parties rested, plaintiff asked the court to direct a verdict in its favor, and the defendant Nelson asked the court to direct the jury to compute the value of the amount of grain taken from him, and direct the jury to bring in a verdict in his favor for the return of the same, or the amount thereof in case a return could not be had. The same motion was made as to defendant O'Dowd.

The motions as to both defendants were denied, as was one on the part of defendants to dismiss the action; and the court then directed the jury to return a verdict in favor of plaintiff, and prescribed the form of the verdict, as follows: "We, the jury in the above-entitled action, find that the plaintiff is the owner of the property described in the complaint, and entitled to the possession thereof, and the value of the property is the sum of ——— dollars." Compute the sum, including the wheat and oats taken from both of the defendants."

The jury disregarded the instructions and direction of the court, and returned the following verdict, viz., "We, the jury in the above-entitled action, find the plaintiff the one-third part is the owner of the property described in the complaint, and entitled to the possession thereof, and the value of the property is the sum of ninety-six dollars for the one-third part taken from Roderick O'Dowd, and that the two-thirds of the grain taken from Olof Nelson be returned to Olof Nelson, or the value thereof. Dated at Beaver Falls this twenty-eighth day of October, A. D. 1896. (Signed) J. A. Bergeley, Foreman."

⁶³ Before this verdict reached the court, the jury had been discharged; and plaintiff's counsel were therefore unable to have it recommitted, as they moved to do. Thereupon they moved for an order setting aside the verdict, and for entry of a judgment in favor of the plaintiff for the full amount claimed. At the suggestion of the court a settled case was made, and thereafter the defendants moved the court for judgment in their favor, notwithstanding the verdict. This motion was made upon eight grounds, which we need not here insert. Judge Webber presided at the trial of the action, and the case was settled before him; but the motion for judgment in favor of defendants notwithstanding the verdict was heard before Judge Powers, who made an order setting aside the verdict, and ordered judgment in favor of the defendants—that Nelson was the owner and entitled to the immediate possession of the grain taken from him by the plaintiff, viz., two hundred and ninety-eight bushels and twenty pounds of wheat, and three hundred and fourteen bushels of oats—and ordered plaintiff to return the amount thereof immediately, or, if a return could not be had, that Nelson recover the value thereof, viz., the sum of one hundred and forty-three dollars and twenty cents, and interest from September 30, 1895; and that the defendant O'Dowd was entitled to the immediate possession of the grain taken from him, viz., one hundred and fifty-eight bushels and twenty

pounds of wheat, and one hundred and fifty-six bushels of oats, and to the immediate return and delivery to him by the plaintiff of all of said grain, or to recover the value thereof, viz., seventy-six dollars, in case a return of said grain could not be had. Judgment was entered accordingly, and the appeal is from the judgment.

Thus Judge Powers, who made the order for judgment in favor of the defendants, disregarded the verdict of the jury, and found the amount and value of the grain, although he did not try the case, and hence did not hear the evidence or see the witnesses. Although the case was one for trial by a jury, and so tried, its functions were entirely disregarded, without consent of the parties. We think that this proceeding was erroneous, and that Judge Powers was without power or authority to so try the issues of fact, and make findings thereon. And the direction of Judge Webber to the jury to return a verdict for the plaintiff proceeded upon an erroneous theory of the law applicable to the case. And the verdict of the jury, taken as a whole, was equally unwarranted, and was ^{not} justified neither by the facts, nor the law applicable to the case. The plaintiff failed to show that it was the owner and entitled to the O'Dowd grain. The evidence showed conclusively that O'Dowd and Nelson stood upon precisely the same ground, legally, as to their respective rights in the grain. If one was entitled to a verdict, so was the other.

At the time of the trial, the plaintiff was in possession of all the grain. Although the answer was a general denial, and the defendants did not claim a return of the property, yet, under such general denial, the defendant may prove any facts which tend to show that the plaintiff is not entitled to the possession of the property—as, for example, that the right of possession is in the defendant himself or in a third party. But a demand in the answer for a return of the property is only necessary to entitle the defendant to a judgment for a return where the case is disposed of without a trial on the merits—as, for instance, where the plaintiff fails to appear at the trial. But, when the case is heard on the merits, section 5413 of the General Statutes of 1894 applies; and a party may have any relief consistent with the case made by the complaint, and embraced within the issues. A demand in the answer for a return of the property taken from the possession of the defendant by proceedings in the action does not raise any new issues, or involve the pleading of any new facts. While the defendant is not en-

titled to a return unless he demands it, yet the answer may be amended after trial, or after judgment, and even after appeal to this court. Such amendment is more a matter of form than of substance, and, when the plaintiff has obtained possession, such demand in the answer would form the basis upon which a proper judgment might be entered: See Cobbey on Replevin, sec. 782.

Our conclusion is, that the judgment as to the defendant Roderick O'Dowd should be affirmed, but that as to Olof Nelson it should be reversed, and a new trial granted, unless he shall consent to a modification of the judgment so that it will be for a return of the property, and not in the alternative.

So ordered.

CROPS—MORTGAGED PREMISES—FORECLOSURE SALE—RIGHT OF TENANT TO GROWING CROP.—As between a purchaser of land at a foreclosure sale and the mortgagor's tenant, crops planted by the latter and matured when the deed is executed, although not severed, do not pass by the sale: *Notes to Monday v. O'Neil*, 48 Am. St. Rep. 764; *Relly v. Carter*, 65 Am. St. Rep. 625. See *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, and note. A crop planted by a tenant for years after the rendition of a decree, to which he is a party, foreclosing a mortgage on the land, belongs to the tenant and not to the purchaser, provided the former is permitted to retain possession until after the crop matures, although the foreclosure sale has been confirmed in the meantime, and notice given by the purchaser to the tenant that he is expected to pay rent to him in money or in kind: *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 760. Crops unsevered from the land at the confirmation of a foreclosure sale become the property of the purchaser, though raised by a tenant of the mortgagor, who was not a party to the foreclosure suit. It is otherwise with crops severed before the confirmation: *Relly v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621. The mortgagor's lessee is not, however, as against the mortgagee, entitled to crops growing on the premises, under a lease subsequent to the mortgage: *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105.

REPLEVIN—FACTS PROVABLE UNDER GENERAL DENIAL. Any defense to an action of replevin may be proved under a general denial: *White v. Gemeny*, 47 Kan. 741, 27 Am. St. Rep. 320; as that property is in a third person: *Notes to Smoot v. Cook*, 100 Am. Dec. 743; *Pattison v. Adams*, 42 Am. Dec. 60.

CARLSON v. ST. LOUIS RIVER DAM AND IMPROVEMENT COMPANY.

[73 MINNESOTA, 123.]

WATERS—USE OF STREAM FOR FLOATING LOGS—DAMAGES FOR OVERFLOWING.—Although a corporation organized for the avowed purpose of driving logs may have a statutory right to build dams across streams, whether navigable or non-navigable, and, by means of sluices, flood-gates, and locks, to discharge the water thus collected for the purpose of aiding the floatage of logs to mills and to market, this right is subordinate to that of a riparian owner below a dam to have his land free from overflow and injury caused by the company's use of the water. Hence, the company has no right to discharge the water so collected into the channel below a dam in such volume as to suddenly raise it above the usual, natural, and ordinary high-water mark, to the injury of such owner, by overflowing his land, as this would be a "taking" of the owner's land, which the company has no right to do, without his consent, or without first paying him compensation therefor.

INJUNCTION TO PREVENT OVERFLOW OF LAND.—An injunction is a proper remedy where a defendant has unlawfully caused the plaintiff's land to be overflowed, and thereby damaged, and threatens and intends to continue so to do.

APPEAL—REJECTION OF IMMATERIAL EVIDENCE.—A trial court commits no error in refusing to permit a defendant to introduce immaterial evidence.

Action to enjoin the defendant company from flooding the plaintiffs' land, and for damages for past flooding. The plaintiff prevailed and the defendant appealed. The defendant made an extended offer to introduce certain evidence, but the court refused to receive it.

Clapp & Macartney, for the appellant.

Eckman & Stevenson, for the respondent.

¹²⁰ **BUCK, J.** The plaintiff owns a farm containing sixty-three acres, through which flows the Cloquet river, the waters of which are discharged into the St. Louis river and thence flow into Lake Superior. The defendant constructed and owns a dam, twenty feet high, extending across said Cloquet river, and there constructed sluices, floodgates, and locks on the said dam, twelve feet high, which can be opened and closed by the defendant at will; and, when closed, the water in said river ¹²³ gathers and collects above said dam, and is retained in great quantities. The defendant also built a similar dam, with similar appurtenances, about ten miles further up said stream, which also gathered said water the same as the other dam. There is

a tributary to said Cloquet river called "Boulder creek," which discharges itself into the Cloquet river above the plaintiff's land. Heretofore the defendant also built across said creek a dam and appurtenances similar to those built by it across Cloquet river, and which collected and retained large quantities of water above said dam.

The defendant is a corporation duly created and organized under the laws of this state, for the avowed purpose, as set forth in its articles of incorporation, of driving logs in the St. Louis river and its tributaries, and of improving said streams for log-driving purposes by clearing and straightening the channel thereof, closing sloughs, erecting sluiceways, booms of all kinds, side-rolling, sluicing and flooding dams, or otherwise facilitating the running of loose logs and timber down said streams. The plaintiff resides upon said land, and uses the same for agricultural purposes. He brought this action to recover damages caused by the defendant during the years 1895 and 1896 by damming up the waters in said streams and discharging the same into the stream below, so as to cause the water in the Cloquet river to overflow its banks and flow over plaintiff's land. The action was tried by the court, and it ordered judgment for the plaintiff in the sum of fifteen dollars damages, and for a permanent injunction as prayed for in the complaint.

The appellant claims that, under the statutes and decisions of this state, a stream that is used for driving logs, with or without the aid, at times, of artificial means, is a navigable stream; that one of the functions of said stream is its use in getting logs to market; that, while the logs may be owned and their traffic conducted by individuals or corporations, the right of navigation is a public right; that the riparian owner on such stream takes his title subject to this public use, and in legal contemplation the same as the owner of lands adjoining a street or highway; and that if the use is necessary, and exercised with care and caution, the necessary damage is a burden incident to the location of the land, and is ¹³² *damnum absque injuria*; and that, while the land upon which this burden is imposed might be condemned for that purpose, yet the defendant, being a quasi public corporation, is entitled to all the rights to navigate the river which the public possess; and that, though this navigation may impose a temporary and incidental burden, it does not impose any liability. In other words, it claims the legal right to build dams across natural non-navigable streams, obstruct the natural flow of their waters, collect them

in large quantities, and discharge them, as its necessities require, upon the lands of the riparian owner in such quantities as to raise the stream to an unnatural and unusual height, and thereby overflow his lands and destroy his crops, and otherwise injure his said property.

The court found as a fact in this case that the streams here involved were non-navigable, and that the defendant, by means of its dams and appurtenances so constructed, was enabled to collect and restrain large quantities of waters of said streams, which it vented and discharged into said Cloquet river in unusual and unnatural quantities, whereby water flowed upon plaintiff's land to his damage. The evidence tends to show that the overflowing of plaintiff's land was not the result of a mere casual trespass, but the natural and necessary effect of the defendant's plan or scheme of improving the navigation of the stream, which will recur whenever these improvements are utilized.

This, in our opinion, was a taking of his property, which it had no right to do without compensation. It was an invasion or violation of plaintiff's private rights, which he suffered, not in common with the public, but as damage solely to his own private property. We may concede without deciding that, under the power conferred by the state upon this defendant corporation, it has the right to build dams across streams not navigable in fact, for the purpose of aiding in floating logs to market and to mills during seasons of low water. Plaintiff has a right to insist that his land shall not be taken for private purposes at all, and not for public purposes without just compensation. "The state has not the right, without making compensation, to take or destroy the property of riparian owners in making a watercourse navigable when it is not so by nature, or in appropriating ¹³³ such watercourse to the public use by artificial erections or improvements": *Weaver v. Mississippi etc. Co.*, 28 Minn. 534, 538; *McKenzie v. Mississippi etc. Co.*, 29 Minn. 288; *In re Minnetonka Lake Imp.*, 56 Minn. 513, 45 Am. St. Rep. 494.

The rule laid down in *Gould on Waters*, section 103, is this: "A corporation which is authorized by statute to construct booms upon a river for the purpose of holding and storing logs acquires thereby no right to appropriate and use the banks, except by the consent of the owners or in the exercise of the power of eminent domain. This property cannot be taken for a purely private purpose; and the fact that booming companies

and companies for the improvement of the navigation are quasi public corporations, and hold their franchises for a public use, does not give them the privileges of a riparian owner, or enable them, by legislative authority, to devote the river banks to the purposes of their charter, without compensation to the riparian owners. Compensation is also necessary where the banks are flooded by public improvements, or by dams erected for the collection and storage of logs, or by a collection of logs in great numbers."

It may be that the construction of the dam, with locks and sluiceways, and the collection of waters, was a right conferred by statute, as well as the right to vent and discharge the same into the channel of the Cloquet river for the purpose of floating logs, and that in discharging such water in sufficient quantity or volume, if kept at or within the usual, natural, and ordinary high-water mark, it only exercised a legal right; but the evidence shows that it went beyond this, and, in so doing, did not exercise any such right. It invaded the plaintiff's legal right by artificial means, whereby his premises were damaged—a burden which plaintiff was under no obligation to submit to without compensation.

The defendant does not claim that any attempt was made to condemn plaintiff's land, and we are of the opinion that its rights were restricted to the use of the stream in such case so as not to raise the water above the usual, natural, and ordinary high-water mark.

As the law does not permit the defendant to flow the plaintiff's land in this manner, and as it claims the right, intends, and threatens to continue so to do, an injunction is a proper remedy: *Morrill v. St. Anthony Falls etc. Co.*, 26 Minn. 222, 37 Am. Rep. 399.

¹²⁴ As the extended offer to introduce certain evidence, excluded by the court, was not material, the court in this respect committed no error.

Order affirmed.

A petition for reargument having been presented, the following opinion was filed July 11, 1898.

PER CURIAM. The substance of counsel's application for reargument is that we have ignored our former decisions holding that the rights of riparian owners on navigable streams are subject to the public right of navigation, and that any incidental injury which such owners may sustain, by reason of the

lawful and reasonable exercise of this public right, is *damnum absque injuria*. In this, as in their original brief, counsel overlook the extent of, and the limitations upon, this public right of navigation as announced and explained in *In re Minnetonka Lake*, 56 Minn. 513, 45 Am. St. Rep. 494, and other cases. The gist of the decision in the present case is not that the defendant was guilty of negligence in doing what it did, but that it had no right to raise the water to the extent it did without paying plaintiff compensation.

Application denied.

WATERS—DAMS—INCREASED FLOW OF WATER BELOW—INJUNCTION.—A riparian owner has no right to retain, by means of a dam, the waters of a natural stream running through his land, and then to discharge them in such quantities into the stream that it is insufficient to carry them, and they therefore overflow the lands of a riparian proprietor below, to his injury: *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740, in which case an injunction was granted; note to *De Baker v. Southern Cal. Ry. Co.*, 46 Am. St. Rep. 254. The state may authorize a riparian owner upon a stream not navigable at the point in question, but becoming navigable below, to erect a dam and use the water for his purposes, but not to the injury of other riparian owners: Note to *Mumpower v. Bristol*, 44 Am. St. Rep. 906. The right of the state or of any private person to make an improvement in a stream for the purpose of creating a water power cannot be sustained to the extent of working an injury to a lower riparian proprietor, except in aid of navigation: *Green Bay etc. Canal Co. v. Kaukauna etc. Power Co.*, 90 Wis. 370, 48 Am. St. Rep. 937. Equity has power to prevent, by injunction, injuries by back flowage of water, caused by a dam: *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265.

APPEAL—HARMLESS ERROR—REVERSAL OF JUDGMENT. The erroneous admission of immaterial evidence is no ground for reversal, where the rights of the appellant were not prejudiced by the error: *Brown v. Markland*, 16 Utah, 860, 67 Am. St. Rep. 629.

ORME v. KINGSLEY.

[78 MINNESOTA, 143.]

EXECUTION—SALARY OF PUBLIC OFFICER AFTER EXPIRATION OF HIS TERM.—Creditors of a public officer cannot intercept his salary by legal process. Hence, the salary of a building inspector cannot be reached by proceedings supplementary to execution for the satisfaction of a judgment, though such proceedings are not commenced until after his term has expired and he has ceased to be an officer.

The plaintiff appealed from an order denying his motion for the appointment of a receiver to take charge of the salary claimed to be due.

W. P. Westfall and Humphrey Barton, for the appellant.

A. E. Bowe and E. J. Darragh, for the respondent.

¹⁴⁴ MITCHELL, J. The plaintiff sought, by proceedings supplementary to execution, to reach, for the satisfaction of his judgment, a balance due, or claimed to be due, from the city of St. Paul to the judgment debtor, William Kingsley, for salary as building inspector.

We have repeatedly held that the salary of a public officer cannot be reached by his creditors by legal process: *Roeller v. Ames*, 33 Minn. 132; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 61 Am. St. Rep. 395; *Sexton v. Brown*, 72 Minn. 371. This doctrine is founded on reasons of public policy, which may be all summed up in the general proposition that any other rule would interfere with the efficiency of the public service.

It is sought, however, to distinguish this from former cases by ¹⁴⁵ the fact that these proceedings were not commenced until after the defendant's term of office had expired, and he had ceased to be an officer. It is argued that under such circumstances it could not possibly affect the efficiency of the public service to permit the salary remaining due the defendant to be intercepted by legal process, and, as the reason for the rule has ceased to exist, the rule itself no longer obtains.

It is quite noticeable that, so far as we can discover, none of the courts which hold with us that the salary of a public officer cannot be intercepted by legal process in favor of his creditors, have laid any stress upon the question whether the person was still an officer, or had ceased to be such before the process was issued. Indeed, we have not found any case where the question was alluded to, and in some of the cases it does not appear what the fact was.

It seems to us that the attempted distinction is merely one of degree, and not of principle. To permit money due as salary to a public officer to be intercepted by legal process after the party had gone out of office could not, of course, affect or change the character of his past services, but such a rule might prejudicially affect the public service generally. The services of public officers are usually not paid for until after they have been performed. They are, as a rule, paid for at stated periods—as, for example, monthly. There must be almost necessarily the lapse of some time between the expiration of a term of office and the payment of the last installment of salary, during which, according to the plaintiff's contention, it would be sub-

ject to be intercepted by legal process. The fact that this could be done might interfere with the right of the public to fill offices with the most suitable men, regardless of their financial condition, and might also affect unfavorably the character of the services of the incumbents of public offices—at least toward the close of their terms of office. We can also conceive of abuses to which it might lead, where the power of removal from office at discretion is vested in some superior officer or body.

It may be, and probably is, an open question whether, under existing conditions, the immunity of the salaries of public officers from legal process benefits or injures the public service; but the doctrine is too firmly established to be overturned by the courts, ¹⁴⁶ and, as long as it obtains, we can see no reason founded on principle for the distinction for which the plaintiff contends.

Order affirmed.

EXECUTION — SUPPLEMENTARY PROCEEDINGS — SALARIES OF PUBLIC OFFICERS.—It has been held that the salary of a city officer may be attached or garnished, while in the hands of the city, in proceedings supplementary to execution: *Rodman v. Musselman*, 12 Bush, 354, 23 Am. Rep. 724; but the rule is, that salaries of public officers in the hands of the appropriate disbursing officer are not liable to attachment, garnishment, or execution, on grounds of public policy: See extended note to *Brown v. Hebard*, 91 Am. Dec. 418, and the monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 114, 118, on the garnishment of municipalities.

SJOBERG v. SECURITY SAVINGS AND LOAN ASSOCIATION.

[78 MINNESOTA, 208.]

CONSTITUTIONS—MANDATORY AND DIRECTORY PROVISIONS—CONSTRUCTION.—All provisions of a constitution should be understood and accepted as mandatory, unless it is unmistakably manifest upon their face that they were intended to be directory. Rules which distinguish mandatory and directory statutes should rarely, if ever, be applied to the provisions of a constitution.

STATUTES WITHOUT AN ENACTING CLAUSE.—A requirement of a constitution that every law shall have an enacting clause is mandatory. Hence, a statute without an enacting clause, where the constitution requires one, is void.

STATUTES LOSING THEIR ENACTING CLAUSE BEFORE THE GOVERNOR'S APPROVAL.—Though a statute had an enacting clause when it passed the legislature, it is void if it had no such clause when it was presented to the governor, where the constitution requires that every law shall have an enacting clause.

RECEIVERS—APPLICATION FOR APPOINTMENT OF—DEFENSE TO.—Compliance with a void law does not necessarily constitute a defense to an application for a receiver.

APPEAL—FINDINGS OF FACT—REVERSAL OF ORDER. If a trial court makes findings of fact, when it is unnecessary to do so, as the basis of its order, and omits to find all facts legally necessary to sustain the order, it will be reversed unless the record shows conclusively that the order is right.

BUILDING AND LOAN ASSOCIATIONS—APPOINTMENT OF RECEIVERS OF.—A court of equity has jurisdiction to wind up the affairs of a building and loan association, when the purposes for which it was organized have failed, and may appoint a receiver therefor, upon the application of one or more of its stockholders, where it is shown that the association is insolvent, or is unable to pay its debts, or has violated any law binding upon it.

BUILDING AND LOAN ASSOCIATIONS—RECEIVER FOR, WHEN NOT JUSTIFIED.—Although the assets of a building and loan association become so depreciated that it is impossible for the corporation to mature its stock according to its contract with its stockholders, and that they are not sufficient to pay back to the stockholders the money actually paid on their stock, such depreciation of assets does not justify the appointment of a receiver for the association, on the ground of insolvency, for it does not constitute insolvency, where there are no general creditors or liabilities of the corporation, except to its stockholders on account of their stock, but merely a loss of corporate capital, and resulting depreciation in the value of its stock.

RECEIVERS FOR BUILDING AND LOAN ASSOCIATIONS WHEN NOT JUSTIFIED—NECESSITY.—A court of equity will not appoint a receiver for a building and loan association unless it is shown to be reasonably necessary. The mere fact that it has ceased to do business, and is no longer a going concern, and that the purposes for which it was organized cannot be carried out, will not justify the appointment of a receiver, on the application of one or more dissenting stockholders, when the association is already in process of liquidation. To justify the appointment of a receiver, under such circumstances, it must be shown that the method of liquidation adopted is inequitable to the plaintiffs, or impracticable, by reason of conflicting interests, or that those having charge of winding up the affairs of the corporation are unfit or improper persons for that purpose, or are unable or unwilling to act, or are pursuing a course injurious to the interests of the plaintiffs, or some other fact tending to show threatened irreparable injury to the interests of the plaintiffs.

Welch, Hayne & Hubachek, A. D. Smith, and J. C. Haynes, for the appellant.

Fifield, Fletcher & Fifield, for the respondents.

208 **START, C. J.** The defendant is a building and loan association, of the class known as "national," incorporated under the laws of this state. The plaintiffs are stockholders of the defendant, and brought this action for the purpose of winding up the affairs of the association, by a receiver to be appointed by the court and under its direction.

The complaint alleges, among other matters, that the defendant is insolvent, but it contains no allegations to the effect that it has any creditors or liabilities, except its stockholders and its liability to them. It also alleges that the assets of the association have become impaired, and the stock is now worth only fifty per cent of the stockholders' investments; that the officers of the association have fraudulently speculated in its stock, mismanaged its affairs, and are now conducting its affairs at great and unnecessary expense; that the defendant, by its board of directors, on September 13, 1897, pursuant to the provisions of the Laws of 1897, chapter 250, adopted a resolution placing its affairs in voluntary liquidation, and its affairs ²⁰⁹ are being liquidated by the same directors and officers whose past mismanagement of its affairs was the cause of its insolvency.

The answer denies all charges of mismanagement of the affairs of the association or wrongdoing on the part of or by its officers; and alleges that, certain stockholders having threatened to apply for a receiver of the defendant, its board of directors, by and with the consent of the public examiner, passed the resolution for voluntary liquidation as a safe, speedy, economical, and equitable method of winding up its affairs; that the assets of the defendant are being carefully conserved and administered by its officers and directors, who have materially reduced expenses; and that all of the defendant's property and assets are now under the control of the public examiner, pursuant to the provisions of the Laws of 1897, chapter 250.

The plaintiffs moved the court for the appointment of a receiver to take charge of the defendant's property, and to manage its affairs pending the action. The motion was brought on for hearing on an order to show cause, and the trial court held that the Laws of 1897, chapter 250, was unconstitutional, and that the proceedings of the defendant taken thereunder for voluntary liquidation of its affairs were void.

Thereupon the court heard evidence on the part of the respective parties as to the matters at issue between them, and found in effect the following to be the facts: "1. That, by reason of losses and the depreciation of the assets of said corporation, it is not possible for said corporation to mature its stock in accordance with the provisions of the contract between it and its stockholders, and that the purposes for which the corporation was organized cannot be carried out; 2. That the assets of the corporation are not sufficient to pay back to the stockholders the money by them actually paid into said corporation

on their stock; 3. That said corporation is insolvent; 4. That said corporation has ceased to do business, and is no longer a going concern; 5. That the interests of the stockholders will be best subserved by the appointment of a receiver"; 6. That the defendant adopted the plans and method for voluntary liquidation referred to in the pleadings, which were approved by the public examiner; and that ever since September 13, 1897, the affairs of the defendant have been in voluntary liquidation, pursuant ²¹⁰ to such methods, which were taken under the provisions of chapter 250 of the Laws of 1897.

Upon these facts, which were incorporated in its order, the court thereby appointed a receiver as prayed for. The defendant appealed from the order.

1. The act of 1897 in question, authorizing the board of directors of building and loan associations, with the consent of the public examiner, to go into voluntary liquidation, contains no enacting clause whatever. The constitution, article 4, section 13, provides that the style of all laws of this state shall be, "Be it enacted by the legislature of the state of Minnesota." Is this provision mandatory or only directory?

There is a conflict in the authorities upon this question. Of the cases which hold similar constitutional provisions directory, the case of *McPherson v. Leonard*, 29 Md. 377, may be regarded as the leading one. The constitution of Maryland provided that the style of all laws of that state shall be, "Be it enacted by the general assembly of Maryland," and the provision was held directory only, and that a failure to comply with it did not render a statute void. There was a vigorous dissent in that case. The constitution of Missouri contains a similar provision; and in the case of *City etc. v. Riley*, 52 Mo. 424, 14 Am. Rep. 427, it was held that the provision was directory only, citing *McPherson v. Leonard*, 29 Md. 377. In the case of *Swann v. Buck*, 40 Miss. 268, it was held that where the enacting clause of a statute read, "Be it resolved," et cetera, instead of, "Be it enacted," et cetera, it was a substantial compliance with the provision of the constitution, which was practically like our own. This case, however, does not hold that a statute without any enacting clause is valid, for the gist of the decision was (see page 293): "There are no exclusive words in the constitution negating the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only. It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended, by the legislative

power that enacts it, that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed. The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'"

²¹¹ There are other cases in which courts have applied the doctrine of directory statutory provisions to constitutional requirements, of which *Pim v. Nicholson*, 6 Ohio St. 177, is an example, in which it was held, contrary to the unbroken line of decisions in this court, that the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title," was directory.

The constitution of the state of Nevada provides: "The enacting clause of every law shall be as follows: 'The people of the state of Nevada represented in senate and assembly do enact as follows': Nev. Const., art. 4, sec. 23. There is no essential difference in its legal effect between this language and that of our constitutional provision that "the style of all laws of this state shall be, 'Be it enacted by the legislature of the state of Minnesota.'" In the case of *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738, it was held that a statute in which an attempt to comply with the constitutional provisions was made, but the words "senate and" were omitted from the enacting clause, was unconstitutional. The court, in its opinion, cites, compares, and analyzes all the decisions upon the question, and reaches the conclusion that the constitutional provision was mandatory.

The courts of Indiana, Illinois, and North Carolina have respectively construed a constitutional provision, like the one now under consideration, mandatory: *May v. Rice*, 91 Ind. 546; *Burritt v. Commissioners*, 120 Ill. 322; *State v. Patterson*, 98 N. C. 660. In the *Seat of Government Case*, 1 Wash. Ter. 115, it was held that a statute without an enacting clause was void, although there was no constitutional provision requiring it.

Mr. Cushing states the rule to be this: An enacting clause is necessary to the validity of every statute, whether required by the constitution or not; and "where enacting words are prescribed, nothing can be a law which is not introduced by those very words, even though others which are equivalent are at the same time used. Where the enacting words are not prescribed by a constitutional provision, the enacting authority must, notwithstanding, be stated, and any words which do this to a common understanding are doubtless sufficient; or the words may be prescribed by rule. In this respect much must depend upon usage": Cushing on Parliamentary Law, sec. 2102.

²¹² The question whether the entire absence of an enacting clause from a statute renders it void is an open one in this state. In the case of Board of Supervisors etc. v. Heenan, 2 Minn. 281 (330), it was held that the provisions of the constitution prescribing the manner of passing bills in the legislature are imperative, and must be strictly followed. It is true that in the opinion in that case it was incidentally stated that many of the provisions in constitutions and statutes, though explicit in terms, are to be construed to be directory. This remark was purely obiter, and there is nothing in the opinion to suggest that a statute without a head—that is, an enacting clause—would be valid.

Upon both principle and authority, we hold that article 4, section 13, of our constitution, which provides that "the style of all laws of this state shall be, 'Be it enacted by the legislature of the state of Minnesota,'" is mandatory, and that a statute without any enacting clause is void.

Strict conformity with the constitution ought to be an axiom in the science of government. We are not prepared to hold that every provision of the constitution is mandatory, but we do hold that they should all be understood and accepted as mandatory unless a different intention is unmistakably manifest on the face of the provision. Rules which distinguish mandatory and directory statutes should rarely, if ever, be applied to constitutional provisions. Courts tread upon very dangerous ground when they attempt to do so: Cooley's Constitutional Limitations, 93. Unless a constitutional provision shows upon its face that it was intended to be directory, it must be accepted as the imperative mandate of the sovereign people, and not as good advice which legislators and courts may accept or reject as they please. The safety of the state, and the protection of the liberties and rights of the people, demand that this rule be strictly adhered to.

But it is claimed that the provision in question shows that it was intended to be directory only, because it relates to a matter of form, and not of substance, and was intended simply to secure uniformity in the style of all laws.

This is one of the objects intended to be secured by the provision, but not the only one. All written laws, in all times and in all countries, ²¹³ whether in the form of decrees issued by absolute monarchs, or statutes enacted by king and council, or by a representative body, have as a rule, expressed upon their face the authority by which they were promulgated or enacted. The almost unbroken custom of centuries has been to preface

laws with a statement in some form declaring the enacting authority. If such an enacting clause is a mere matter of form, a relic of antiquity, serving no useful purpose, why should the constitutions of so many of our states require that all laws must have an enacting clause, and prescribe its form? If an enacting clause is useful and important, if it is desirable that laws shall bear upon their face the authority by which they are enacted, so that the people who are to obey them need not search legislative and other records to ascertain the authority, then it is not beneath the dignity of the framers of a constitution, or unworthy of such an instrument, to prescribe a uniform style for such enacting clause. But it is otherwise if an enacting clause be a mere form, devoid of essence or substance. The concession that the object of the constitution, in prescribing the style of the enacting clause of a law, was to secure uniformity, necessarily implies that the matter of an enacting clause was so essential and important as to require uniformity in the mode of expressing it. Surely, it was not the intention to secure uniformity in the style of a useless form.

It is not necessary to go to the extent of holding that, in the absence of any constitutional provision on the subject, a statute without an enacting clause would be void. But we do hold that the framers of our constitution, and the people adopting it, advised by the usages of the past, and the wisdom and legal learning of the men who had framed the constitutions for so many other states, regarded an enacting clause in a law as useful, necessary, and proper, and that they therefore anchored in the constitution a requirement that every law should have an enacting clause, and prescribed the form thereof. The words of the constitution, that the style (that is, the mode of expressing or declaring) of all laws of this state shall be, "Be it enacted by the legislature of the state of Minnesota," imply that all laws must be so expressed or declared, to the end that they may express upon their face the authority by which ²¹⁴ they were enacted; and, if they do not so declare, they are not laws of this state.

It is, however, claimed by appellant that the law in question contained an enacting clause at the time it passed the legislature, and that the trial court erred in excluding evidence of such fact. The ruling was correct, for the fact itself was immaterial, for the reason that a bill, although it passes the legislature, never becomes a law, unless it be presented to the governor pursuant to article 4, section 11, of the constitution. If the bill in question contained an enacting clause when it passed

the legislature, it was never presented to the governor, but in place of it a bill was presented to and approved by him containing no enacting clause.

It follows that the Laws of 1897, chapter 250, is void, and that a compliance with its provisions does not necessarily constitute a defense to the application for a receiver in this case.

2. This brings us to the question whether the facts found by the trial court justify its order appointing a receiver. The defendant claims that they do not. The plaintiffs' counsel seek to supplement the findings by reference to the evidence tending to show, as they claim, that the officers of the defendant who are carrying out the scheme of liquidation adopted are unfit persons to have charge of the winding up of its affairs, and that they are pursuing a course injurious to the interests of the plaintiffs.

So far as the plaintiffs are concerned, the order must stand or fall upon the findings of fact. Where the trial court makes findings of fact as the basis of its order (although it is unnecessary so to do), and omits to find all facts legally necessary to sustain the order, it will be reversed, unless the record conclusively shows that the order is right: *Wells v. Penfield*, 70 Minn. 66.

The district court may appoint a receiver of a building and loan association on the application of one or more of its stockholders, under the General Statutes of 1894, chapter 76, in a proper case, or by virtue of its inherent jurisdiction as a court of equity. To constitute a proper case for appointing a receiver for such associations under chapter 76, it must be shown that the corporation is insolvent, or is unable to pay its debts, or has violated one or more of the provisions of its act of ²¹⁵ incorporation or of any other law binding on the corporation: Gen. Stats. 1894, sec. 5900.

The only fact found by the trial court to bring the case within these provisions is the fact that the defendant is insolvent. But this fact must be considered in connection with the allegations of the complaint and the other facts found by the court. The complaint shows that the plaintiffs are not creditors of the defendant, in the usual meaning of the term, but simply stockholders of the defendant; and it makes no claim that the defendant owes anything except to its stockholders. The charge of insolvency in the complaint is in these words: "That said corporation is now, and for more than one year last past has been, wholly insolvent, and without sufficient funds to pay back to its stockholders more than one-half of the money paid in by them on account of their stock."

If we read, as we must, this allegation with the first, second, and third findings of the court, it is manifest that the defendant is insolvent only in the sense that it is impossible for the corporation to mature its stock according to its contract with its stockholders, and that its assets are not sufficient to pay back to such stockholders the money actually paid on their stock.

Where there are no general creditors or liabilities of the corporation except to its stockholders on account of their stock, such a depreciation of assets does not constitute insolvency, in the sense in which the word is used in chapter 76, but merely a loss of corporate capital, and resulting depreciation in the value of its stock. The statutory remedies for winding up a corporation on the ground of insolvency do not apply to such a case: *Knutson v. Northwestern etc. Assn.*, 67 Minn. 201, 64 Am. St. Rep. 410. The case of *State v. Bank of New England*, 55 Minn. 139, is not here in point, as the defendant was an insolvent banking corporation, and the plaintiff a creditor.

A court of equity has, however, jurisdiction to wind up the affairs of a corporation when the purposes for which it was organized have failed. And it would not be difficult to suggest reasons why a court of equity ought to do so in the case of a building and loan association when it would not on the same facts interfere with ²¹⁶ the affairs of an ordinary corporation, especially so in an action by the state: See *State v. American etc. Assn.*, 64 Minn. 349.

But the mere fact that a building and loan association or any other corporation has ceased to do business and is no longer a going concern, and that the purposes for which the corporation was organized cannot be carried out, when the corporation is already in process of liquidation, will not justify the appointment of a receiver on the application of one or more dissenting stockholders. To justify the appointment of a receiver under such circumstances, it must be shown that the method of liquidation adopted is inequitable to the plaintiffs, or impracticable, by reason of conflicting interests, or that those having charge of winding up the affairs of the corporation are unfit or improper persons for that purpose, or are unable or unwilling to act, or are pursuing a course injurious to the interests of the plaintiffs, or some other fact tending to show threatened irreparable injury to the interests of the plaintiffs.

There was no finding by the trial court as to any of these matters, and it is not conclusively shown by the record that any of them are true. But it does conclusively appear that the affairs of the corporation are being wound up under the direc-

tion of the public examiner by a committee of its directors approved by him. It is true, as claimed, that the law under which this action was taken is void, and that there is no statute giving to the directors of the defendant express authority to go into voluntary liquidation, even with the advice and consent of the public examiner. But that officer is given, by statute, express supervision of the affairs of the association; and, where it is not shown that it is reasonably necessary for a court of equity to take the affairs of the corporation into its own hands to protect the interests of the plaintiffs, it will not appoint a receiver.

We are not to be understood as passing on the question of the sufficiency of the evidence to justify a finding in favor of the plaintiffs upon any or all of the matters suggested. We simply hold that the findings actually made do not go far enough to show that it is necessary, for the protection of the interests of the plaintiffs that ²¹⁷ the court should appoint a temporary receiver for the defendant, and that for this reason the order appealed from must be reversed, and a rehearing on the application for such appointment granted.

So ordered.

MITCHELL, J. While I concur in the result, I am not prepared to assent to the proposition that the provision of the constitution as to the style of laws is mandatory, and that the absence of an enacting clause renders a statute void. I assent to the proposition that courts should be very slow in holding constitutional provisions to be merely directory, and that they ought never to do so unless it conclusively appears that the provision relates exclusively to a mere matter of style or form, which neither affects any right nor tends to prevent any wrong.

But, in my judgment, the provision relating to the style of laws is one of exactly that kind. As stated in the opinion of the court, it had been the custom almost from time immemorial to prefix an enacting clause to every statute; but, as I understand the law, the omission to do so (in the absence of any constitutional provision requiring it) would not invalidate the act. A reference to the early English and the colonial statutes will show that there was no uniformity in enacting clauses, a great variety of forms being used, according to the taste of the legislative body enacting the law. Prior to the American Revolution it had been customary to state in the enacting clause that the statute was enacted by or with the consent of the reigning sovereign of Great Britain. This style became inappropriate after the declaration of our independence. Hence, it

became necessary to adopt some new style; and to this end, and at the same time to obtain uniformity, the former colonies usually inserted a provision in their state constitutions providing what the style of statutes should be. This was not designed to protect any right or to prevent any wrong, but merely to provide a new and uniform style in place of the old ones, which were no longer appropriate to the changed political conditions. This is not necessary in order to show by whom the law was passed, for that is apparent from the official publication of the laws or the engrossed ²¹⁸ bills on file in the office of the secretary of state or other proper officer, in connection with constitutional provisions as to the legislative department of the government, of which every person is presumed to be cognizant.

As the decision of the majority of the court will, so far as I am personally concerned, be accepted as the settled law of this state, I do not care to say more than thus to briefly state my reasons for thinking that this provision of the constitution should be held to be merely directory.

But even if the laws of 1897, chapter 250, is not rendered invalid by reason of the absence of an enacting clause, still if, in case of voluntary liquidation under its provisions, the majority of the stockholders should adopt an illegal method of liquidation, or should put in charge unfit persons, who were mismanaging its affairs and sacrificing the rights of stockholders, the district court, by virtue of its inherent equity jurisdiction, would have the power to appoint a receiver to take charge of and administer the corporate assets. If the last clause of the act of 1897 is to be construed as attempting to deprive the courts of this power, I have no doubt it is void; but this would not affect the validity of the remainder of the act.

In the other parts of the opinion of the court I fully concur.

Canty, J., concurred with Justice Mitchell.

Buck, J., dissented.

On July 7, 1898, the following order was entered:

PER CURIAM. Ordered, on motion of respondents, after hearing the appellant, that the order heretofore made herein be, and it is, modified so as to read as follows: Ordered that the order appointing a receiver in this case be, and it is hereby, reversed, and the case remanded for a rehearing on the application for the appointment of receiver; but this order shall not affect the right of the receiver named in the order appealed from to retain and control the property of the appellant in his pos-

session by virtue of such order until the lapse of not exceeding thirty days next after the filing of the remittitur in the district court.

CONSTITUTIONS—CONSTRUCTION.—A constitution is always to be understood in its plain, untechnical sense: Page v. Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

CONSTITUTIONS—STATUTES—ENACTING CLAUSE.—It has been held that a constitutional requirement that statutes shall be preceded by the formal enacting clause, "Be it enacted," et cetera, is directory merely, and that the omission of such clause does not invalidate a statute: Cape Girardeau v. Riley, 52 Mo. 424, 14 Am. Rep. 427. Contra, State v. Rogers, 10 Nev. 250, 21 Am. Rep. 738.

RECEIVERS—BUILDING AND LOAN ASSOCIATIONS.—As to when the appointment of a receiver for a building and loan association is justified, see monographic note to Cameron v. Groveland Imp. Co. ante, p. 26, on when it is proper to appoint a receiver.

SELOVER v. SHEARDOWN.

[73 MINNESOTA, 393.]

NEGLIGENCE OF MINISTERIAL OFFICER IN DISCHARGE OF SPECIAL DUTY.—If an individual suffers injury from the negligence of a ministerial officer in the discharge of a special duty, he has a right of action founded, not on contract, but on breach of duty.

NEGLIGENCE OF CLERK OF UNITED STATES COURT IN FURNISHING FALSE INFORMATION—DAMAGES.—If an attorney in a United States court case is, in response to his inquiry, notified by the clerk of court that judgment has not been entered when, in fact, it has been entered, and the attorney, who, by agreement, is liable for the costs and expenses of suit, is notified that judgment has been subsequently entered on a certain date, which statement is also untrue, and immediately after such notice incurs useless expense in prosecuting an appeal, which is dismissed because not taken in time, the clerk is answerable to such attorney for the damage sustained by reason of the false information as to the latter's first inquiry, especially where the clerk is authorized to charge a fee for giving information from his records. His negligence, in such a case, is the proximate cause of the damage sustained by taking the appeal.

Action to recover damages of the defendant for his negligence in giving untrue information, as stated in the opinion. A demurrer to the complaint was sustained, and the plaintiff appealed from a judgment in favor of the defendant.

George H. Selover, pro se, the appellant.

P. Fitzpatrick, for the respondent.

³⁹⁴ BUCK, J. The questions involved upon this appeal arise from a demurrer to the complaint, the claim being made that the latter does not upon its face state facts sufficient to constitute a cause of action.

The allegations in the complaint are substantially as follows: That plaintiff, who was an attorney at law, in February, 1894, with other attorneys, who have assigned their rights to him, entered into an agreement with the city of Wabasha to prosecute a claim of sixty thousand dollars against the Chicago, Milwaukee & St. Paul Railway Company, said attorneys to pay all costs and expenses of the suit against said company in the prosecution of the claim. The suit for such claim was duly commenced in the district court of Wabasha county, but afterward duly removed to the United States circuit court of Minnesota, first division, where it was tried June 4 and 5, 1895, and a verdict rendered in favor of the company; and on June 6, 1895, after recording the said verdict, judgment of dismissal was entered in the minutes of said United States court. On December 4, 1895, two days before the expiration of the six months from the entry of said judgment of dismissal (being the time allowed for appeal), the plaintiff herein, as one of the attorneys for the city, telegraphed the following inquiry, addressed to the "Clerk of U. S. Court, Winona, Minn.," to wit: "Was judgment entered Wabasha-Milwaukee case? If so, when? Answer."

The same day defendant, then the duly appointed and acting deputy clerk of said court, answered said telegram as follows: "Judgment not entered"; signing said telegram, "J. M. Sheardown, Deputy"—he then knowing that judgment of dismissal had been entered, as above stated, June 6, 1895. Subsequently the defendant and the attorneys for the said railroad company notified plaintiff that judgment had been entered in said action on December 16, 1895, against said city and for costs.

³⁹⁵ Plaintiff also alleges, in substance: On January 31, 1896, the plaintiff and his associate attorneys for the city caused to be issued, in the name of the United States circuit court of appeals for the eighth circuit, a writ of error to said circuit court in said action. On March 11, 1896, a transcript of the record was filed in the office of the clerk of said appellate court. Said transcript was printed by said last-named clerk, and copies thereof delivered to plaintiff and his associates, in April, 1896, and from said printed record plaintiff and his associates learned for the first time that judgment had been entered in said action on June 6, 1895, or at some other time than December 16, 1895.

On May 4, 1896, on motion of said railway company, said appellate court dismissed said writ of error on the ground that the same was sued out more than six months after entry of final judgment in the action, and sent remittitur down to said circuit court. In order to get said cause properly before said appellate court, plaintiff and his associates necessarily expended three hundred and six dollars for fees of printer and clerks and other expenses, and between December 4, 1895, and May 4, 1896, they performed, in and about making the petition for the writ of error and preparing for a hearing in the appellate court and in other matters connected with the cause, services of the reasonable value of seven hundred and fifty dollars. It was the official duty of defendant to answer said telegraphic inquiry from plaintiff, and to make searches, and report upon the same to any persons asking therefor, and he was authorized to charge a certain fee for such service, which fee was in this instance paid, not at the time of performance of service, but on January 31, 1896. Plaintiff and his associates expended money and performed services as aforesaid in reliance upon the truth of the information received from defendant. That, had defendant transmitted correct information, said expenditure would not have been made nor said services rendered. That the defendant was negligent in the premises, and, by reason of such negligence, said services were rendered useless, and said money so expended was lost to plaintiff and his associates, to their damage in the sum of one thousand and fifty-six dollars.

There are no allegations of fraud, or that defendant intentionally deceived plaintiff and his associates.

³²⁶ Was the defendant negligent in thus answering the plaintiff's telegram? Section 828 of the United States Revised Statutes provides the fees which the clerk shall receive for making search for any particular mortgage, judgment, or other lien, and for searching the records for judgments, decrees, or other instruments, and for certifying the result of such search; and we are of the opinion that it was the official duty of the clerk or his deputy in this instance to furnish correctly and truly the information from his judicial records to the plaintiff which he asked for. The defendant deputy clerk did assume so to act, but either did not search the records, or did so negligently, and sent an untrue statement, which misled the plaintiff, and we think that negligence was the proximate cause of the damage sustained by the plaintiff. He relied upon defendant's telegram of December 4, 1895, and upon the notice both from the

railroad attorneys and the defendant himself that judgment had been entered against the city; he took the appeal, which was dismissed because not taken in time.

The first inquiry was a proper one. The answer was an official statement, in answer thereto, which induced the plaintiff to take the steps which he did, and incur the costs for which he has sued in this action. It was not incumbent upon the plaintiff to allege that he would have succeeded in the appellate court, in order that he may recover; for what he is suing for is not the loss of the suit, but the labor and money which he was induced to expend in reliance upon the false information furnished by the defendant. It was this act of the defendant which caused him to incur the expense.

It is a general rule that wherever an individual has suffered injury from the negligence of a ministerial officer, in the discharge of a special duty to himself, an action lies on behalf of the party injured, for the action is founded, not on contract, but on breach of duty: Wharton on Negligence, section 284. It was the particular duty of the defendant to furnish the required information to the plaintiff, and the law fixes his compensation for so doing, and the injury which plaintiff sustained by reason of defendant's negligence in not furnishing plaintiff the required information rendered the defendant liable: *Morgan v. Mix*, 44 N. Y. 315.

If we could assume that which the trial judge says was conceded ³⁹⁷ at the argument, but which does not appear in the record—that it is the usual practice in the United States courts to enter two judgments—a different case might, perhaps, be presented. But the defendant, having sought to raise the question of his liability by demurrer, must stand upon the alleged insufficiency of the complaint on its face.

Judgment reversed.

NEGLIGENCE.—A PUBLIC MINISTERIAL OFFICER is answerable, in a civil action, for any act of negligence or misconduct, whereby damage results to the party complaining: *Eslava v. Jones*, 83 Ala. 139, 3 Am. St. Rep. 699. Every public officer whose duties are not judicial is liable to an individual who sustains special damage from the negligent performance of such officer's duties, or his omission to perform them: *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, and extended note thereto; *Wilson v. Mayor*, 1 Denio, 595, 43 Am. Dec. 719. One who neglects to perform a specific duty imposed upon him by law is answerable for injuries proximately produced by such neglect: *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698.

BAXTER v. SHERMAN.

[78 MINNESOTA, 484.]

AGENCY—UNDISCLOSED PRINCIPAL—BUYER'S RIGHT OF SETOFF AGAINST AGENT.—If the owner of goods intrusts them to an agent, with authority to sell in his own name, without disclosing the name of his principal, and the agent so sells, to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, he may set off any demand he may have on the agent against a demand for the goods made by the principal. This rule does not obtain where the purchaser knows that the agent is not the owner of the goods, or when circumstances are brought to his knowledge which ought to have put him upon inquiry, and by investigating which he would have ascertained that the agent was not the owner.

AGENCY—UNDISCLOSED PRINCIPAL—RIGHT OF SET-OFF AGAINST AGENT.—If an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent, unless, in making the purchase, he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his account.

AGENCY—EQUIVOCAL SALES BY AGENT OF UNDISCLOSED PRINCIPAL—RIGHT OF SETOFF AGAINST AGENT—HOW TO ACQUIRE.—If a person sells goods in an equivocal manner, sometimes on his own account and sometimes as the agent for an undisclosed principal, the buyer is not entitled to set off a debt due from the seller in any transaction, unless he inquires in what character the seller is acting in that particular transaction. If it turns out, as it did in this case, that he bought of an undisclosed principal, he ought not to be allowed the benefit of any setoff.

AGENCY—UNDISCLOSED PRINCIPAL—SETOFF AGAINST AGENT—HOW AFFECTED BY CUSTOM.—If fruit and produce is sold by the agent of an undisclosed principal, a local custom of the dealers in such goods, at the place of sale, to settle their accounts with each other by balancing and offsetting all outstanding bills between themselves, without regard to whether such bills are due to or from them as factors or as principals, does not of itself give the buyer any right to set off a debt due him from the agent, and is, therefore, no defense to a suit brought by the principal against the buyer for the price, particularly where such custom was unknown to the plaintiff.

CUSTOM—OPERATION OF KNOWLEDGE.—A local custom, even if valid, is operative only in respect to those who are shown to have knowledge of it.

Action to recover the purchase price of certain goods alleged to have been sold by the plaintiffs, Baxter and others, to the defendant. There was a judgment for the defendant, and the plaintiffs appealed from an order denying their motion for a new trial.

Wright & Matchan, for the appellants.

S. A. Reed, for the respondent.

⁴³⁷ MITCHELL, J. One Shea was, to the knowledge of the defendant, a commission merchant or factor, who sold, on account of the consignors, fruit and produce consigned to him by others; but at the same time he dealt on his own account in the same kind of property. The defendant was a dealer on his own account in the same city in the same kind of property. The plaintiffs were engaged in the fruit and produce business at Nauvoo, Illinois, and had for years been in the habit of shipping such property to Shea as their agent, to be by him sold on their account and to remit to them the proceeds, less his commissions. For this purpose, in August, 1896, they shipped to him a consignment of fruit. Shea sold the fruit to the defendant on August 21st. There was no express agreement between Shea and the defendant for any credit, but the purchase price was not paid at the time of the delivery of the fruit, the custom of those in the trade in Minneapolis being to settle accounts between themselves once a week. On August 22d, Shea and defendant had a settlement, in which the price of plaintiff's fruit was applied upon or offset against an individual debt due from Shea to the defendant, contracted on August 18th or 19th. This debt had no sort of connection with the sale of plaintiff's fruit. On August 26th, Shea, being insolvent, made an assignment for the benefit of his creditors. He has never accounted to the plaintiffs for the proceeds of their fruit, and defendant has never paid for the same unless by applying the price as above stated upon the debt which Shea owed him. Plaintiffs brought this action to recover the price of the fruit.

As factors or commission merchants may sell in their own name the goods of their principals, we shall assume, although there is no express finding to that effect, that Shea sold this fruit without disclosing the name of his principal or stating whether this property belonged to himself or to another. The evidence, as well as ⁴³⁸ the finding, is to the effect that defendant knew that, while Shea sold fruit and produce on his own account, he was also engaged in the business of selling it as factor or agent for others who consigned it to him for sale on their account. Therefore, under the circumstances, a sale by Shea in his own name to the defendant was not the equivalent of a statement that he was selling on his own account. On the contrary, it amounted only to an assurance that the fruit was either his own property or the property of some principal who had employed him to sell. With this knowledge of the equivocal relation of Shea to the property, and with actual

knowledge that it had been shipped to Shea by somebody (for defendant himself took the fruit out of the car in which it had been transported from Nauvoo, and paid the railroad freight), the defendant, so far as appears, made no inquiry whatever of Shea or anyone else as to whose property it was, or whether Shea was acting for himself or for a principal.

The court found that defendant had no knowledge or information of any claims of plaintiffs in or to the property until after the settlement with Shea. This may be, and probably is, technically and literally supported by the evidence, but, as will be seen hereafter, is wholly insufficient to entitle the defendant to offset his debt against Shea against plaintiffs' demand for the price of their property.

It is not important that the purchaser from a factor did not know who the principal was, if he knows, or is chargeable with notice, that the property belongs to a principal, and not to the factor. It is well settled by an almost unbroken line of authorities, from *George v. Clagett*, 7 Term Rep. 359, down, that if the owner of goods intrusts them to an agent with authority to sell in his own name, without disclosing the name of his principal, and the agent sells in his own name to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, he may set off any demand he may have on the agent against the demand for the goods made by the principal. This setoff need not exist at the time of the sale. It is sufficient if it arise before notice of the real ownership of the goods.

As applied to factors, this rule might seem at first to be inconsistent ⁴³⁰ with the equally well settled doctrine, so much relied on by the plaintiffs, that a factor or commission merchant has no power to pledge his principal's goods for his own benefit; that such an act is tortious and void as against the principal; and that, too, without regard to the pledgee's ignorance of the fact that the factor was not the real owner of the property: See *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196.

But both rules are equally well settled; and we apprehend that the distinguishing feature between the two is that a sale of the principal's goods in the name of the factor is within the implied actual authority of the latter, while a pledge is not. The rule referred to in the case of sale rests upon the doctrine of equitable estoppel, and is merely an application of the familiar principle that, where one of two innocent persons must suffer by the fraud of a third, the loss should fall upon him

whose act or negligence enabled the third person to commit the fraud.

But this rule should not be extended beyond the reason or principle upon which it is founded. It was never intended to be so used as a shield as to make every right of the real owner subordinate to the right of a third party, dealing with the agent, to gain every possible advantage of the transaction. Hence, where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent, unless, in making the purchase, he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account. The rule of *George v. Clagett*, 7 Term Rep. 359, does not obtain where the purchaser knows that the agent is not the owner of the goods, or when circumstances are brought to his knowledge which ought to have put him upon inquiry, and by investigating which he would have ascertained that the agent was not the owner. Where the character of the selling is equivocal, as in this case, and, as was known to the defendant, Shea was in the habit of selling, sometimes on his own account and sometimes as agent, it was incumbent on defendant, if he desired to avail himself of a setoff, to inquire in what character Shea was acting in that particular transaction, and if he chose to make no inquiry, and it turned out, as it did, that he bought of an undisclosed ⁴⁴⁰ principal, he ought not to be allowed the benefit of any setoff.

Defendant had sufficient information to advise him that it was quite as likely that Shea was acting as factor as that he was acting for himself. This was of itself enough to put him upon inquiry, not as to Shea's authority to sell, but as to his own right of setoff, if he desired to buy with a view of covering his own debt or availing himself of a setoff. Presumably, if he had inquired of Shea, he would have been informed that Shea was acting merely as agent for another. Should Shea have refused to inform him whether he was acting for himself or for a principal, defendant could have declined to make the purchase. Knowing what he did, and having entered into the transaction without inquiry, defendant could have had no honest or reasonable belief one way or the other as to the ownership of the property; and under these circumstances he can have no right, as against the demand of the plaintiffs, to insist on a setoff, or upon the attempted application of the purchase price of their fruit on his claim against Shea.

Without attempting to cite or review the authorities on this subject, we merely refer to the notes to *George v. Clagett*, 2 *Smith's Lead. Cas.* 1359, where most of the authorities, both American and English, are referred to; and to *Cooke v. Eshelby*, *L. R.* 12 App. Cas. 271, where the subject is fully discussed and all the English cases reviewed.

Our conclusion is that the findings of fact were not sufficient to justify the conclusions of law, and that the evidence would not have justified any findings which would have entitled the defendant to prevail.

2. The defendant was permitted, under the objection and exception of the plaintiffs, to introduce evidence of a local custom in Minneapolis among those engaged in the fruit and produce business, such as Shea and defendant were engaged in, of running weekly accounts on cash sales, instead of paying spot cash on each transaction, and then making weekly payments and settlements, in which they allowed and offset against each other all bills accruing during the past week, and, in short, having a sort of weekly clearance between themselves, in which they balanced and offset all ⁴⁴¹ outstanding bills between themselves, without regard to whether such bills were due to or from them as factors or principals.

This evidence was clearly immaterial and incompetent for any purpose. This so-called "custom" was an arrangement among the local dealers solely for their own convenience, which they acted on entirely in reliance upon the financial responsibility of each other. If, in the absence of any such custom, defendant would have no right to apply the price of plaintiffs' fruit on the individual debt of Shea, the custom could give him no such right; for the effect of such a custom would be to permit an agent to appropriate his principal's property to the payment of his own debt, which would be contrary to well-established principles of law, as well as good morals. Therefore such custom would be void.

Moreover, no evidence was introduced or offered that plaintiffs had any knowledge of the alleged custom; and nothing is better settled than that a local custom, even if valid, is operative only in respect to those who are shown to have knowledge of it; and there can be no presumption that a stranger living in Illinois had any knowledge of a local custom in Minneapolis. It is doubtless true that where the owner of property consigns it for sale to a factor, it is within the implied or apparent authority of the factor to conform to any general and uniform custom of the

place to which the property is consigned as to the terms or conditions of sale, whether the consignor knew of the custom or not; but the custom here sought to be proved does not come within any such principle.

Order reversed and a new trial granted.

AGENCY—UNDISCLOSED PRINCIPAL—BUYER'S RIGHT OF SETOFF AGAINST AGENT.—If a person sells goods to a purchaser, without disclosing his agency, and the purchaser has no knowledge that the former is not the owner of the goods, the purchaser may, in an action by the principal for the purchase money, set off a demand due him from such agent: *Notes to Belfield v. National Supply Co.*, 189 Pa. St. 189, 69 Am. St. Rep. 799; *Powell v. Wade*, 55 Am. St. Rep. 921, 923. Every undisclosed principal, as against those who deal with his agent as the real owner, runs the risk of having his claim met by the setoff of a demand due from the agent to a purchaser, and the only way of obviating this is by giving notice of his title: *Belfield v. National Supply Co.*, 189 Pa. St. 189, 69 Am. St. Rep. 799.

CUSTOM—KNOWLEDGE.—A custom, to be binding, must be known to both parties: *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350, 10 Am. St. Rep. 669; and not contravene any rule of law: *Jackson v. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; note to *Smith v. Clews*, 11 Am. St. Rep. 632.

SPRAGUE v. SPRAGUE.

[78 MINNESOTA, 474.]

MARRIAGE AND DIVORCE—ACTION BY DIVORCED WIFE FOR INCREASED ALIMONY—PROPERTY RIGHTS—RES JUDICATA.—Under the statute of Minnesota, a complaint for divorce is good without any allegation as to property, or property rights. It is unnecessary to anticipate a claim for alimony, and it is immaterial that the defendant is not within the state. So, if a husband brings a suit for divorce against his wife, who is temporarily absent from the state, and she, being personally served by a delivery of copies of the summons and complaint to her, fails to appear or answer, and the court, though the complaint is wholly devoid of any allegation as to property, or rights therein, or as to alimony, finds, as a fact, that the husband has property, and decrees not only that the parties be divorced, but that the wife have an allowance and permanent alimony in lieu of all claims upon the husband's property, the presumption is, in a subsequent suit by the divorced wife for increased alimony, and where there are no allegations to the contrary in her complaint, that all of the husband's property was within the jurisdiction of the court in which the divorce proceedings were instituted. Hence, as that court had jurisdiction of the property, and power, under the statute, to award and decree alimony, under the circumstances, the question of property rights is *res judicata*, and the divorced wife is barred from any further claims on her former husband's property.

Duxbury & Duxbury, for the appellant.

E. H. Smalley, for the respondent.

⁴⁷⁶ COLLINS, J. Appeal from an order sustaining a demurrer to a complaint in an action instituted by a divorced wife to recover alimony. While the demurrer was interposed upon several grounds, the questions resolve themselves into an inquiry as to the sufficiency of the facts stated to constitute a cause of action.

The controlling facts, as pleaded, may be presented as follows: Plaintiff and defendant became husband and wife in the county of Fillmore, in this state, in the year 1882, and thereafter lived together as husband and wife in this state until the summer of 1896. They have no children. Their residence has continuously been, and still is, in this state—at present, and for many years last past, in Houston county, in which this action was brought. Plaintiff's health became impaired, and in 1896 she left home for medical treatment, and in June, 1897, was in a hospital at Portland, Oregon. At that time defendant commenced an action in said Houston county, where both parties resided, as before stated, for divorce against plaintiff, upon the ground of willful desertion. Copies of the summons and complaint were personally served upon and left with plaintiff June 5th at said Portland, and these copies are made a part of the complaint herein. The plaintiff made no answer in that action, ⁴⁷⁷ and such proceedings were thereafter had as to result in a duly rendered decree of absolute divorce.

The complaint in the divorce case was wholly devoid of allegations as to the amount of the defendant's property, or as to the plaintiff's right therein; and there was no intimation that any relief would be sought involving a determination of these rights, or that any question of alimony would be passed upon.

But in its findings the court found as a fact that defendant's personal and real property was of the value of fifteen thousand dollars; and judgment was ordered that defendant pay to plaintiff, as her allowance out of his estate and as permanent alimony, the sum of four thousand five hundred dollars, which was to be in lieu of all claims upon his property. The judgment or decree of divorce, including judgment for alimony in accordance with the order, was entered on August 17, 1897, and is still in full force and effect.

The plaintiff also alleges in the present complaint that she refused to live with defendant upon the advice of her physician;

that thereupon "defendant insisted that he must have a divorce and separation, to which plaintiff had no objection." It is also alleged that defendant is worth the sum of one hundred and fifty thousand dollars, and plaintiff's demand is that she may have judgment for the sum of fifty thousand dollars permanent alimony.

The subject now before us—of the right of a divorced husband or wife to maintain an action for alimony—has been frequently discussed by the courts; and these discussions have led to great confusion, ending in conflicting views and results, as will appear from an examination of the cases cited in *Thurston v. Thurston*, 58 Minn. 279, in which this court laid down some general rules in reference to the subject, but in a case wholly different from this on the facts.

Here an action was brought for divorce by a husband against his wife in the county in this state in which both resided, and which for years had been their place of domicile. As she was temporarily absent from the state, constructive notice only of the pendency of the action could be given to her, and this was done by personal delivery of copies of the summons and complaint to her. Thereafter the court duly proceeded to a hearing of the cause—this plaintiff ⁴⁷⁸ being in default for want of answer, and really, according to her own admission in this complaint, consenting to a judgment of divorce; and after such hearing a decree was rendered which not only divorced the parties, but determined the plaintiff's rights in her husband's real and personal estate—a decree which is still in full force, not having been appealed from, and no attempt having been made to open or to set it aside. The presumption is, in the absence of any allegation to the contrary, that all of defendant's real and personal property, whether of the value of fifteen thousand dollars, as found by the court in the former action, or of the value of one hundred and fifty thousand dollars, as alleged in the complaint now under consideration, was within the jurisdiction of the court of his domicile—concededly Houston county—when the court assumed to adjudge as to such property, and to award to this plaintiff a portion of the same. So we have a case where the domicile of both parties to the action for divorce, and where the property over which the court assumed to act, were within its jurisdiction; and the only reasons urged why the court had no right to adjudicate as to alimony are that the party against whom the action was brought was temporarily absent from the state, that constructive service only of the summons and com-

plaint could be made upon her, and that in the complaint there was no intimation that any attempt would be made to determine her rights in her husband's property.

The difference between this and the Thurston case is very marked. There a husband domiciled with his wife in this state had deserted her, and had acquired a residence in another state; his property remaining here, within the jurisdiction of our courts. Alleging untruthfully that he had resided in the state for one year, he commenced an action for divorce against his wife, obtained constructive service on her, and, for want of an answer, secured a decree, which was held to be valid, although the husband obtained it by falsely alleging his residence in that state to have been for at least one year. The husband's property was never within the jurisdiction of the court granting the divorce, and it made no effort to determine anything in connection therewith. It was rightfully held that the action for divorce in another state was in the nature of an action in rem, seizing nothing but the marriage status. No ⁴⁷⁹ property was or could be seized, for the reason that it was all in this state; and nothing was settled but that the marriage bonds were severed as to both parties. All other questions, said the court, are res novo. The conclusion, under this state of facts, was that as to the property in this state the wife could maintain an action for the recovery of alimony, although the parties were already divorced.

But such conclusion does not warrant the contention made here, that a good cause of action has been stated in this complaint. The action for divorce in this state is regulated by express statutory provisions: Gen. Stats. 1894, c. 62, secs. 4785-4821. The plaintiff must have resided here for one year immediately preceding the time of the exhibition of the complaint (section 4792), and the action must be brought in the county in which the plaintiff resides (section 4794). The requisites of the complaint are prescribed in section 4795, and a plaintiff need not allege anything in respect to his or her property, or in respect to the property or property rights of the defendant. The complaint in the divorce action brought by this defendant contained every statutory requisite, and it was not necessary to anticipate a claim for alimony on plaintiff's behalf. Again, section 4799 expressly provides that in every action, either for divorce or separation, the court, in its discretion, may require the husband to pay suit money and expenses, while by section 4807 the court is authorized, "upon

every divorce for any cause, excepting that of adultery committed by the wife," to decree to the wife alimony out of the husband's estate. And the court is also authorized (sections 4801-4803) to make orders concerning the custody of the minor children, if any. Of course, the statute confers no authority upon the court, except as to property or children within its jurisdiction.

It seems obvious, under these statutory provisions, that, where the plaintiff in an action for divorce has property or children within the jurisdiction of the court in which he properly brings his action, the court, for all purposes of such action, has full and complete power and authority over such property or children, as an incident to its power and authority to sever the marriage ties. These are incidents of the subject matter over which the court has jurisdiction, and it is immaterial that the defendant in the action ⁴⁸⁰ is not within the state. That fact—constructive notice of the pendency of the action being given—does not affect the jurisdiction of the court over the subject matter. Let us suppose that from the complaint herein it appeared that there were minor children of these parties within the borders of our state. Could the power and authority of the court to award the care and custody of these children to either of these parties be doubted? We think not. This power and authority would arise out of the fact that these children were within the jurisdiction of the court in which a divorce proceeding was properly pending, and it would be immaterial that the defendant was absent from the state, and could only be given constructive notice of the bringing of the action. As was said in the Thurston case (*Thurston v. Thurston*, 58 Minn. 286): "It is not the policy of a court of equity, or any other court which has complete jurisdiction of the parties and of the subject matter, to do justice by halves, or to permit a party to present an entire controversy by piecemeal, when there is no obstacle to its being all presented at once, or to a full and complete determination of the whole controversy in one proceeding."

We hold, for the reasons hereinbefore stated, that the court in which was instituted the divorce proceeding had jurisdiction to award and decree alimony, notwithstanding defendant failed to appear or answer, and therefore that the question is *res judicata*, and this plaintiff is barred from any further claims against the defendant's property. She must abide by the terms of that decree, unless it is vacated or modified.

Order affirmed.

MARRIAGE AND DIVORCE — DECREE OF DIVORCE AGAINST NONRESIDENT — SETTLEMENT OF PROPERTY RIGHTS AND ALIMONY—RES JUDICATA.—A bona fide resident of a state may there prosecute a suit for divorce against a nonresident spouse, and obtain a decree which will dissolve the marriage tie, though the defendant does not appear in the proceeding, and the service of process is constructive, or is made outside of the state: Note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 183, where other views are shown. A final decree of divorce settles all property rights of the parties, and bars a subsequent action by either party to determine any question of alimony or property rights, which might have been settled by such decree, and a decree on service by publication is as effectual as where personal service is made: Note to *Doerr v. Forsythe*, 40 Am. St. Rep. 705.

AM. ST. REP., VOL. LXXII.—41

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

DEMARS v. KOEHLER.

[82 NEW JERSEY LAW, 203.]

COVENANTS AGAINST ENCUMBRANCES contained in a deed are broken by the existence of an outstanding term in the lands, and an action for the breach thereof may be maintained, although the existence of such term is known to the grantee when he accepts the conveyance.

COVENANTS AGAINST ENCUMBRANCES.—A right of action on a covenant against encumbrances arises upon the existence of the encumbrance irrespective of any knowledge on the part of the grantee, or of any eviction of him, or of any actual injury it has caused him, so that if he has not paid off or bought in the encumbrance he is entitled at least to nominal damages.

S. J. Macdonald, for the plaintiff in error.

T. Anderson, for the defendant in error.

203 **MAGIE, C. J.** The judgment under review affirmed a judgment of the Essex circuit court in an action **204** of covenant, in which Demars was plaintiff and Koehler was defendant.

The record discloses that the action was brought upon a covenant against encumbrances contained in a conveyance of lands made by Koehler to Demars, and that the breach of the covenant claimed by Demars was based on the existence of an outstanding term in the lands in one Mutschler.

The bills of exception show that upon the trial it was established that, at the time of the execution and delivery of the conveyance in question, the premises conveyed were in the possession of Mutschler, who held them under an unexpired term created by Koehler. The trial judge ruled that Demars could

not maintain his action upon the covenant by reason of the existence of such outstanding term, because it appeared that he had knowledge of the existence of that term when he accepted the conveyance. On this ground the jury were directed to find a verdict in favor of Koehler.

The supreme court approved the ruling of the trial judge and affirmed the judgment upon the directed verdict: *Demars v. Koehler*, 60 N. J. L. 314.

The proposition enunciated by the supreme court is that a grantee cannot maintain an action upon a covenant against encumbrances contained in his conveyance by reason of an outstanding term in the lands conveyed, if he had notice of the existence of the term before accepting the conveyance. I find myself unable to assent to that proposition, which I deem opposed both to reason and authority.

Professor Greenleaf declares that a breach of the covenant against encumbrances is shown when the proofs establish that a "third person has a right to or an interest in the land conveyed, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance": 2 Greenleaf on Evidence, sec. 242. This definition of encumbrance is substantially that given by Chief Justice Parsons in *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246. It was approved in *Mitchell v. Warner*, 5 Conn. 497, and adopted by Chief Justice Green in *Carter v. Denman*, 23 N. J. L. 260, 272.

²⁰⁵ The diminution of value which is thus made a test of an encumbrance is not, however, to be understood as limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person, of less pecuniary worth, but also extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, does not acquire by the grant the complete dominion over the thing granted which the grant apparently gives, but is or may be deprived thereby of the whole or some part of its use or possession. The diminution of pecuniary value is important in the admeasurement of damages for the breach of this covenant, but does not form the test whether an outstanding right or interest is an encumbrance or not. If the thing granted be, or be liable to be, diminished by the existence of an outstanding right or interest, so that the grantee does not acquire the complete dominion which the grant purports to convey, then, although the diminution of pecuniary worth may not appear

and the damages may be only nominal, such right or interest is an encumbrance.

It was properly conceded in the supreme court that an outstanding term of years is an encumbrance within the meaning of the covenant against encumbrances, notwithstanding the grantee has acquired the right to enforce the provision of the lease without the necessity of attornment on the part of the tenant: 32 Henry VIII, c. 34; Gen. Stats., p. 875.

It is conceivable that land leased at a large rent and for a long term might be of greater pecuniary worth and command a higher price than the same land without such a lease. But no one would contend that a purchaser without knowledge of the lease would be disabled from recovery upon a covenant against encumbrances contained in his deed by proof that his purchase was in fact more advantageous to him than he had expected. Such evidence might be admissible on the question whether his damages should be substantial or only nominal, but would be entirely inadmissible to defeat recovery. The reason is that the deed has not conveyed to him the complete dominion of the land which it purported to do.

²⁰⁸ How does the grantee's knowledge of the existence of such an encumbrance alter the situation? Such knowledge does not ordinarily prevent recovery upon this covenant. It could not be contended that a grantee would be debarred from recovering for a breach of this covenant resulting from an outstanding mortgage, by proof that he had constructive notice of the mortgage by its record or had actual knowledge of its existence. The encumbrance of an outstanding term for years differs from an encumbrance of a mortgage only in respect to the right of the grantee to enforce the lease. But the existence of that right and the fact that it has resulted from his acceptance of the deed does not, as we have seen, make the outstanding term no encumbrance as respects a grantee without knowledge of it. Knowledge of its existence cannot alter its character as encumbrance. The land granted is, or may be, thereby diminished so that the grantee does not acquire that use and possession which the deed purported to grant.

Mr. Rawle, conceding that, if there be a real encumbrance, the purchaser's knowledge of its existence will furnish no defense to an action on this covenant, ingeniously suggests that such knowledge may have a material bearing in determining what was the subject matter of the contract: Rawle on Covenants for Title, 95, 96. With equal ingenuity the opinion be-

low denies the right to recover upon this covenant because such an encumbrance, known to the grantee, is not within its terms and consequently no breach of the covenant. With great respect, I deem the reasoning specious and the conclusion insupportable, for knowledge of the existence of an encumbrance not only does not destroy its inherent character as encumbrance, but may and often does lead to the purchaser's requiring the grantor to protect him by covenants: *Smith v. Lloyd*, 29 Mich. 382. When a covenant is made against all encumbrances, without exception, knowledge of the existence of one encumbrance cannot take that encumbrance out of the general terms of the covenant, unless such was the intent of the parties. But knowledge alone does not prove such intent, for a contrary intent is consistent with it. Proof of ²⁰⁷ knowledge or other proof of the intent of the parties that a particular encumbrance should be excepted from the general terms of the covenant could only be admitted by a violation of the canon of evidence which forbids parol proof to vary the terms of a written contract.

It results that a grantor who fails to except from his covenant against encumbrances one which is known to the grantee cannot defeat recovery upon that covenant by proof of such knowledge. The grantee is not compelled to require for his protection a special covenant against the known encumbrance, but may rely on the general and unrestricted covenant against all encumbrances.

This result is in no respect antagonistic to the decision of the master of the rolls in *James v. Lichfield*, L. R. 9 Eq. Cas. 51, cited and relied on in the court below. In that case specific performance of a contract for the sale of land was asked, with compensation for the diminished value of the land by reason of outstanding leases not mentioned in the contract. Performance with such compensation was refused because the purchaser knew of the possession of the tenants, and was held to have thereby had constructive notice of the outstanding terms and their duration. Whether such knowledge on the part of a purchaser amounted to constructive notice was doubted, and the case in that respect criticised, in *Caballero v. Henty*, L. R. 9 Ch. App. 447. But if the case is not open to criticism, it is obvious that it did not involve a construction of the covenant against encumbrances or the right of recovery thereon, but only whether the purchaser had an equitable right to enforce a contract for the sale of land and obtain a conveyance with compensation for encumbrances of which he had notice.

The current of decisions in this country is largely in accord with the conclusion I have reached. Indeed, my examination discloses no contrary views, except those expressed by the courts of Indiana. In respect to those decisions it is sufficient to say that they seem to be based upon doctrines to which we have never subscribed. In *Page v. Lashley*, 15 ²⁰⁸ Ind. 152, it was declared that proof was admissible to establish a parol agreement respecting an outstanding lease, contemporaneous with the deed and varying its terms, and upon that doctrine it was held that proof of knowledge of the existence of such a lease led to the inference that there was such a parol agreement. A similar result was reached in *Kellum v. Berkshire Life etc. Co.*, 101 Ind. 455. It was upon the authority of the last-cited case that a late text-writer relies in enunciating the doctrine that the existence of a lease known to the grantee will not, under a statute transferring the constructive possession to the grantee without attornment by the tenant, operate a breach of the covenant against encumbrances: *Maupin Mar. Tit.* 293. But it is obvious that such decisions can have no weight in jurisdictions where the rule forbidding the introduction of parol evidence to vary a written contract is maintained.

The general rule is, that the right of action on the covenant against encumbrances arises upon the existence of the encumbrance, irrespective of any knowledge on the part of the grantee or of any eviction of him or of any actual injury it has occasioned him, so that if he has not paid off or bought in the encumbrance he is entitled at least to nominal damages: 2 *Greenleaf on Evidence*, sec. 242; 2 *Washburn on Real Property*, 707; *Carter v. Denman*, 23 N. J. L. 260, 272; *Townsend v. Weld*, 8 Mass. 146; *Hovey v. Newton*, 7 Pick. 29; *Harlow v. Thomas*, 15 Pick. 66; *Batchelder v. Sturgis*, 3 Cush. 201; *Spurr v. Andrew*, 6 Allen, 420; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135; *Rickert v. Snyder*, 9 Wend. 416; *Smith v. Lloyd*, 29 Mich. 382; *Edwards v. Clark*, 83 Mich. 246; *Hubbard v. Norton*, 10 Conn. 422; *Pritchard v. Atkinson*, 3 N. H. 335; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Barlow v. McKinley*, 24 Iowa, 69; *Long v. Moler*, 5 Ohio St. 371.

We are not called upon to determine by what rule damages should be admeasured in such a case as that under review. The judgment, having been rendered upon a verdict erroneously directed, must be reversed and the record remitted for further proceedings according to law.

A COVENANT AGAINST ENCUMBRANCE is broken immediately, and a right of action accrues at once, if an encumbrance exists at the time of the conveyance: *Andrews v. Davidson*, 17 N. H. 418, 43 Am. Dec. 606; *Huyck v. Andrews*, 118 N. Y. 81, 10 Am. St. Rep. 432. Covenants against encumbrances are covenants against things existing at the time they are made. If broken at all, they are broken at the moment they are made: *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 598. Covenants against encumbrances in a deed cover those unknown as well as those known to the grantee at the time of his purchase: *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428; *Huyck v. Andrews*, 118 N. Y. 81, 10 Am. St. Rep. 432. If a purchaser has paid nothing toward removing an encumbrance, and is not evicted, he will recover only nominal damages in an action on a covenant against encumbrance: *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. Rep. 57.

HAVER v. CENTRAL RAILROAD COMPANY.

[62 NEW JERSEY LAW, 282.]

RAILROAD COMPANIES—LIABILITY FOR ASSAULT ON PASSENGER BY EMPLOYÉ.—A railroad company, or other common carrier, is liable for a malicious assault made by its employé upon a passenger, although such act is a wanton and willful trespass. The liability of the carrier in such case rests upon the principle that it has engaged to perform certain duties and has selected its own employés, and hence an assault by an employé is a breach of duty of the carrier to the passenger.

CARRIERS—DUTY TO PROTECT PASSENGERS.—A common carrier is bound, as far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of his own servants engaged in executing the contract.

Action against a railroad company to recover for a malicious assault by its employé. The plaintiff, Haver, took passage on the defendant's train, whereupon the baggage-master thereon immediately demanded his fare. This he refused to pay to such employé of the company, and shortly thereafter paid his fare to the conductor on the train. Thereupon the baggage-master violently assaulted and severely injured plaintiff. He suffered a nonsuit, and sued out a writ of error.

Roberson & Demarest, for the plaintiff in error.

G. Holmes, for the defendant in error.

282 **DEPUE, J.** A master is liable for the trespass of his servant committed within the scope of his authority, even though, in exercising his authority, he use unnecessary violence; but for a trespass committed by the servant willfully,

or of his own malice, under color of discharging the duties of ²⁸⁴ his employment, or where he has gone beyond the line of his duty to commit a trespass, the master will not be liable. This rule of law, where the relation of master and servant exists uncontrolled by other circumstances, is well settled. It was so decided by this court in *Brokaw v. New Jersey etc. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659. The action in that case was in trespass for ejecting the plaintiff with force and arms out of the car of the railroad company "while he was traveling in said car," and the case was before the court on demurrer. Whether the plaintiff was lawfully a passenger in the company's car, and entitled to the privileges and protection due from the carrier to its passengers, does not appear in the case.

The plaintiff in this case became a passenger in the defendant's car, and at the time of this occurrence had paid his fare to the conductor, and was entitled to all the rights, privileges, and protection which the law accords to passengers, and subject to the duties and liabilities which the law imposes on a carrier for the safety of its passengers.

The case now before the court depends, not upon the law of liability of a master for the acts of his servants, but upon the duty imposed on the railroad company in the carriage of the plaintiff as a passenger. The duty of a carrier of passengers is to safely and securely carry persons who bear to it the relation of passengers. The carrier is under obligation to use the utmost care and diligence in providing suitable and sufficient vehicles for the conveyance of its passengers, to carry the passenger therein to the end of his route, to protect him against assault and other ill-treatment by those employed by and under the carrier's control while on the way, and to exercise the utmost vigilance and care in maintaining order and guarding the passenger against violence, from whatever source arising, which might reasonably be anticipated or naturally expected to occur in view of all the circumstances and the number and character of persons on board: *Cooley on Torts*, 644; 5 Am. & Eng. Ency. of Law, 2d ed., 541. In the application of this principle the grade of the employé by ²⁸⁵ whom the injury was done or the scope of his employment is immaterial. The courts of England seem to apply to such a situation the ordinary rule that prevails as between master and servant: *Allen v. L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65; *Walker v. S. E. R. R. Co.*, L. R. 5 Com. P. 640; *Railway Co. v. Broom*, 6 Welsb. H. & G. 314.

In *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122, 7 Am.

Rep. 418, the court of appeals of New York held that the defendant was not liable for the act of the conductor in pushing a passenger from the car while it was in motion. The decision was put upon the ground that the act of the conductor was a wanton and willful trespass, not in the performance of any duty to or any act authorized by the defendant, and therefore the defendant was not liable. This case was overruled in *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185. In that case the plaintiff, while a passenger on one of the defendant's street-cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor. It was held by the court that the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting in the scope of his employment did not apply as between a common carrier of passengers and a passenger, and the principle was affirmed that a common carrier undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418, was set aside in the decision of this case, on the ground that that case had been determined by the court upon the assumption that the rule of the master's liability for the assault of a servant committed upon a person to whom the master owed no duty was applicable to that case. *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185, was affirmed and followed in *Dwinelle v. New York Cent. etc. R. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, in which it was held that whatever be the motive that incites the servant to commit an unlawful and improper act toward the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences. This liability was deduced from the obligation of the carrier to protect the passenger against any injury from negligence or willful misconduct of its servants while it performed its contract to carry.

In some of the cases, in defining the liability of a carrier of passengers for the willful acts of his servants, the expression "within the scope of employment" or "in the line of duty" is used. Neither of these expressions, in the usual sense, is applicable to this subject except as descriptive of circumstances under which the liability of the carrier is unchallenged. Thus, in *Steamboat Co. v. Brockett*, 121 U. S. 637, the court held that a common carrier undertakes absolutely to protect his

passengers against the misconduct or negligence of his own servant employed in executing the contract of transportation and acting within the general scope of his employment. In that case the action was founded upon an assault committed by a servant upon a passenger in enforcing rules and regulations of the company, and consequently the act was done while the servant was acting within the general scope of his employment. The case did not call for the consideration of the liability of the master under other circumstances, and it will be observed that Mr. Justice Harlan, in delivering the opinion of the court, quotes with apparent approbation the principle adopted in *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588, 591, 43 Am. Rep. 185, that a common carrier is bound, as far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and copassengers, and undertakes absolutely to protect them against the misconduct of his own servants engaged in executing the contract. The expressions above quoted, used in the cases, mean nothing more than that the carrier is not liable for the acts of the servant when he is off from the duties of his employment, and consequently not employed in executing the carrier's contract of transportation.

In *Pendleton v. Kinsley*, 3 Cliff. 416, the suit was against the owner of a steamboat on which the plaintiff was a passenger.²⁸⁷ A dispute arose between the plaintiff and the clerk about the payment of fare. Subsequently, the plaintiff was assaulted by the clerk on board the vessel and during the same trip. The defense was that the clerk was not, at the time of the assault, acting in the course of his employment, and therefore the owner of the vessel was not responsible for his acts. Mr. Justice Clifford, in overruling the defense, said that "the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and liabilities of the parties to this controversy." Speaking of the defense, the learned judge said: "Adjudged cases may be referred to which support that proposition without qualification, but they do not give full scope and effect to the obligation which the carrier assumes toward his passenger nor to the rights and duties which those relations create and imply. Passengers do not contract merely for shiproom and transportation from one place to another, but they also contract for good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed

in the management of the ship or other conveyance, and for the fulfillment of those obligations the carrier is responsible as principal, and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employ  s, may proceed against the carrier as the party bound to make compensation for the breach of the obligation." The above extract from *Pendleton v. Kinsley*, 3 Cliff. 416, is quoted with approbation in *Bryant v. Rich*, 106 Mass. 180, 189, 8 Am. Rep. 311. The liability of the carrier in such cases rests upon the principle that he has engaged to perform certain duties and has selected his own servants for the performance of that duty, and hence an assault by an employ   is a breach of the duty of the carrier to his passenger.

This subject is discussed by Mr. Elliott as follows: "There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term ²⁸⁸ 'scope of employment' or 'line of duty' in a different sense in different cases, or to a failure to place the decision on the correct ground. It is not merely a question of negligence in such cases, nor is it a question strictly depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the willful act of an employ   or not. . . . Either the company or the passenger must take the risk of infirmities of temper, maliciousness, and misconduct of the employ  s whom the company has placed upon the train and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take this risk, and to hold it responsible": 4 Elliott on Railroads, sec. 1638.

The cases on this subject, in the courts of our sister states, are not harmonious, but the great weight of authority is in favor of the doctrine declared by the New York cases which have been cited. The decisions are collected in an elaborate note to 5 American and English Encyclopedia of Law, second edition, 541-548. It is quite unnecessary to reproduce them here. The doctrine that a common carrier of passengers undertakes to carry a passenger safely and securely is nowhere impugned, and to apply to assaults upon a passenger by one of its employ  s the doctrine that rests solely upon the relation of

principal and agent is to overlook the peculiar obligation that rests upon the carrier of passengers and the liability which results from the failure to discharge that obligation.

In actions against common carriers the plaintiff may sue in *assumpsit* on the contract to carry or in case, on the common law duty: 1 Saunders' Pleading and Evidence, 325.

Under the evidence appearing on the record the nonsuit should not have been granted, and the judgment should be reversed.

CARRIERS—DUTY TOWARD PASSENGERS—ASSAULT BY EMPLOYÉ.—It is a carrier's duty to protect passengers from injury, violence, insult, and ill-treatment at the hands of its employes, during the course of transportation: *Savannah etc. Ry. Co. v. Quo*, 103 Ga. 125, 63 Am. St. Rep. 85. A common carrier, whether by steamboat, railway, or otherwise, is under obligation to convey his passenger safely and properly, and to treat him respectfully. If he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute it. Hence, the carrier is responsible for the malicious and wanton acts of the servant to a passenger, whether done in the line of his employment or service or not, if done during the course of the discharge of his duty to the master which relates to the passenger: Monographic note to *Richmond etc. R. R. Co. v. Jefferson*, 32 Am. St. Rep. 95, where the entire question of the carrier's duty to protect passengers is fully treated. See, also, the extended note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 89.

ATLANTIC CITY RAILROAD COMPANY v. GOODIN.

[62 NEW JERSEY LAW, 294.]

RAILROAD COMPANIES — NEGLIGENCE — DUTY TO LOOK AND LISTEN.—Failure of a passenger to look and listen for approaching trains when crossing a track, in passing from train to station, is not necessarily negligence. The question is one for the jury.

MARRIAGE BY CONTRACT.—A contract of marriage made *per verba de praesenti*, without a ceremony, and without witnesses, but between competent persons, amounts to an actual marriage and is valid.

J. W. Morgan and C. V. D. Joline, for the plaintiff in error.

G. J. Bergen, for the defendant in error.

394 **COLLINS, J.** The writ of error in this cause removes a judgment for damages recovered on verdict under the death act. The chief complaint is that the trial judge refused to decide, as a matter of law, that the decedent was guilty of negli-

gence contributing to his death, but submitted the question of such negligence to the jury as one of fact. The defendant operates a double-track railroad between Camden and Atlantic City. At Lawnside, one of its regular stopping-places for accommodation trains, the station adjoins the westbound track. Outside the eastbound track there is an uncovered platform, level with the track, where the conductor and trainmen stand to assist passengers, but up to the time of the occurrence in controversy passengers on eastbound trains had been permitted, without objection, to alight, if they wished, ³⁹⁵ on the side of the train toward the station, and it was customary for those living on that side of the town, or those who wished to go to the station, to alight upon that side. Each rail of each track was planked, on both sides, the whole length of the platform, and the intervening spaces were filled in with cinders to the level of the tops of the rails. There was no special place of crossing provided. The company had published to its employes the following rule: "Any train approaching a station when a passenger train is receiving or discharging passengers must be stopped before reaching the station and must not proceed until the passenger train moves away or a signal is given to go on, except when safeguards are provided." There were no safeguards at Lawnside and no gates on the car platforms. On July 21, 1896, John H. Goodin was a passenger on an eastbound accommodation train scheduled to stop at Lawnside, where he lived. It did stop there. The car in which Goodin rode was carried beyond the platform, and on that side stood opposite a ditch and embankment beyond. Goodin alighted on the side toward the station, and was struck and instantly killed by a westbound express train. There was nothing to prevent his seeing the train had he looked before stepping on the track. It is contended that he was indisputably negligent.

There are adjudged cases that hold that when a railroad company provides a convenient place at which to alight from a train, and invites egress only there, a passenger takes the risk of alighting elsewhere. Those cases are pressed upon our consideration. Whether sound or not, they do not touch the point of the present inquiry, viz., What is the duty of passengers where, after they have alighted, there is necessity to cross a track in order to reach the company's station? We are asked to apply the same rule of duty to look and listen that is rigidly enforced upon the traveler on a highway. There is a plain difference between the case of such a traveler about to cross a railroad

and the case of a passenger entitled to safe conduct to or from the company's station. In this state and in most other jurisdictions this difference is recognized by the courts.

³⁹⁸ Vice-Chancellor Van Fleet, in *Klein v. Jewett*, 26 N. J. Eq. 474, 479, points out that the rule of duty at a public crossing has no application to a case where, by the arrangement of the company, it is made necessary for passengers to cross a track in order to reach the station or the cars. He says: "They [the railroad company] are bound to provide a way by which passengers may pass in safety. If the way provided crosses a track, no train should be permitted to pass over it at the point where passengers are required to cross it while a train is receiving or discharging passengers." On affirmance by this court (*Jewett v. Klein*, 27 N. J. Eq. 550), Mr. Justice Dalrimple said that a passenger crossing a track which intervened between a station and a train standing at the station to receive passengers was not bound to look to see whether another train was approaching. That decision would seem to be controlling in this case. A distinction is urged because it related to a crossing from station to train—not from train to station. This is a distinction without a difference. It is the passenger's right to go to the company's station, and a safe way for the purpose must be provided. In the later case in this court of Delaware etc. R. R. Co. v. Trautwein, 52 N. J. L. 169, 175, 19 Am. St. Rep. 442, Mr. Justice Depue well states the true rule thus: "The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access are reasonably safe."

The great current of authority elsewhere is to the effect that failure to look for trains when crossing a track in passing from train to station is not necessarily negligent. The question is always one for the jury. The New York cases are most numerous, many of them being in the court of last resort. A full citation will be found in *Van Ostran v. New York Cent. etc. R. R. Co.*, 35 Hun, 590. The following decisions in other jurisdictions are clear and explicit on the subject: *Railway Co. v. Johnson*, ³⁹⁹ 59 Ark. 122; *Denver etc. R. R. Co. v. Hodgson*, 18 Colo. 117; *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483; *Boas v. Providence etc. R. R. Co.*, 15 R. I. 149; *Chicago etc. R. R. Co. v. Lowell*, 151 U. S. 209; *Robostelli v. New York etc. R. R. Co.*, 33 Fed. Rep. 796.

In the case last cited the doctrine was even applied where the crossing was not to a station building, but to a mere gate of exit customarily used to reach the town, the stopping-place being at a junction and the single platform being on the opposite side. Some of the earlier Pennsylvania decisions were not very discriminating and may seem to uphold the defendant's contention, but the later cases are in substantial accord with the general trend of judicial opinion: *Pennsylvania R. R. Co. v. White*, 88 Pa. St. 327; *Flanagan v. Philadelphia etc. R. R. Co.*, 181 Pa. St. 237. The only decision to which we have been referred directly supporting the proposition that it is necessarily negligent for a passenger to cross from train to station without looking for a possible train on an intervening track is *Connolly v. New York etc. R. R. Co.*, 158 Mass. 8. That decision treats the question inadequately without noticing the right of passengers to assume that their safety will not be imperiled by the carrier. The precedents cited are all highway cases. Massachusetts seems to stand alone on this subject.

That in the case in hand the passengers were only invited to alight upon a platform on the side away from the tracks is not a controlling circumstance, but simply a fact for the jury. Such was the fact in all the cases cited. The passengers were not forbidden to alight on the other side, but, on the contrary, had always been permitted to do so. Wherever they should alight they would have to cross the tracks to reach the station, where they had a right to go, and there could be no appreciable difference whether they should alight on the platform and then walk around the train and cross, or wait until the train should move on before crossing, or, as ³³⁶ Goodin did, alight on the side toward the station and cross at once.

In *Chicago etc. R. R. Co. v. Lowell*, 151 U. S. 209, there was a notice posted in the cars that passengers leaving a car by the front should pass to the right, and by the rear to the left (to a platform); in order to avoid trains on the other track. A passenger failed to observe this rule in alighting from a car, and in attempting to cross an intervening track to the opposite side of a double station was struck and injured by a passing train. In delivering the opinion of the supreme court of the United States Mr. Justice Brown remarked: "Had the plaintiff complied with the notice and alighted upon the platform he would still have been obliged to cross the track, with the same possibility of being struck by a passing train that confronted him in this instance." And in *Robostelli v. New York etc. R. R. Co.*, 33 Fed. Rep. 796,

Judge Wheeler thus elaborates the same argument: "Passengers from West New Rochelle stopping at this station could not reach there from the train on the track which this train was on without crossing the other track. They could get off on to the platform and go past the end of the train and cross, or get directly down on the other side and cross. If they should get off on the platform and wait for the train to leave, they would still have to cross, and there was no shelter there or other conveniences for waiting. The train could not pass on the other track without the liability of encountering these passengers, and, if it passed while the train was standing and the passengers alighting, it would be quite likely to encounter them when attempting to cross by the rear of the other train."

It is noteworthy that in the case in hand the company's rule only forbade the passing of trains until the train at the station should move on. Strictly construed, that rule made it more dangerous to wait for the train to move on than to cross at once. In the Massachusetts case it was conceded that the passenger had the right to alight on the side of the train toward the station, although there was provided on the other side a platform for that purpose. The ruling was that ³⁰⁰ wherever he alighted he was bound to look before crossing the track.

It is suggested that Goodin was not intending to go to the station, but to his home on the same side of the tracks. That circumstance is immaterial. It existed in several of the cases above cited. Goodin had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track.

One other matter deserves notice. Goodin was a daily traveler by that particular train and presumably knew that the express was scheduled to pass Lawnside only three minutes before the accommodation was due there, and it is argued that he should have had in mind the fact that it was behind time, as the trains had not passed one another at their usual point of passing. That argument was useful for the jury, but not conclusive for the court. I know of no rule of duty for a traveler on a railroad train to keep alert to such conditions. Within a few weeks there had been a change in the time table. Before the change the arrival at Lawnside of the accommodation preceded the passing of the express by nine minutes. It is too much to say that, as a matter of law, Goodin should have remembered the change and should have noticed that the express had not passed. Besides he had the protection of the company's own rule not to

permit a train to come while his train was receiving or discharging passengers. It was not proved that he knew of this rule, but several of the decisions above cited hold, and I think rightly, that knowledge of such a rule by passengers may be presumed. For this reason also the Massachusetts case *ubi supra* is unsatisfactory, for it declares a contrary presumption.

A careful reading of the whole testimony convinces me that; under the circumstances of this case, the question of contributory negligence was for the jury.

The only other errors assigned relate to the beneficial right of the plaintiff individually in her suit as administratrix. Goodin left no child or descendant of a child and no parent. The plaintiff claimed as widow the entire benefit of the suit: Pamphlet Laws 1896, p. 134. If she were not such, there could have been ⁴⁰⁰ no recovery under the declaration as framed, and, while the proof showed that the deceased left a sister, the case was not tried on any theory that recovery could be had in her interest. The measure of damages, of course, would have differed, and, as the judge in his charge to the jury put the matter of damages on the basis of a recovery by a widow, it is but fair to consider proof of that status as vital.

The judge, on the motion to nonsuit or direct a verdict, rightly refused to decide that there was no such proof. There had been a ceremonious marriage between Goodin and the plaintiff many years before, but it was conceded that soon afterward the plaintiff had learned that at the time of the marriage Goodin had a wife from whom he was separated. Cohabitation was nevertheless continued and the parties were reputed to be husband and wife. About 1892 the real wife died. Reliance is placed by the defendant upon the doctrine declared in chancery and approved in this court that where one of two persons, knowing of an existing bar to his or her marriage, perpetrates a fraud upon the other by going through a marriage ceremony, such marriage is void, and that, although such bar be subsequently removed, cohabitation and reputation thereafter as husband and wife will not justify a presumption of marriage: *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404; *Collins v. Voorhees*, 47 N. J. Eq. 315, 555, 24 Am. St. Rep. 412. If the plaintiff's case had rested on presumption it would have failed, but such was not the fact. It rested upon the proof of an actual marriage after the first wife's death. Some proof of reputation of marriage was indeed admitted under objection, and its admission is now assigned for error. Under the *Voorhees* case it was not evidential, but, as it

was of no avail whatever to the plaintiff, it was immaterial and harmless to the defendant. In the Voorhees case, Vice-Chancellor Van Fleet concedes that a contract of marriage made per verba de praesenti amounts to an actual marriage and is valid, and in the case of Stevens v. Stevens, 56 N. J. Eq. 488, Vice-Chancellor Pitney declares the law on the subject to the same effect, citing abundant authority. Dr. Bishop makes it quite plain that in this country, in the absence of prohibitive legislation, no more is ⁴⁰¹ required to constitute a legal marriage than that the man shall declare in words of the present tense that the woman is his wife and that the woman shall assent. No witness need be present and no particular ceremony is necessary: Bishop on Marriage, Divorce and Separation, cc. 14, 15, secs. 299, 313. The effect of a recent statute of this state applicable only to nonresidents (Pamphlet Laws 1897, p. 378) need not now be considered.

The plaintiff by her own testimony made a *prima facie* case of such a marriage contract made directly after the first wife's death. True, no witness was present, but there was not the slightest reason to doubt the plaintiff's story and every reason to believe it. It had corroboration in the testimony of a niece of the plaintiff, to whom Goodin had said in 1892 or 1893, after the first wife's death, "Your aunt is now my lawful wife." One of the exceptions assigned for error was the refusal to strike out this admission of marriage, but it was clearly competent evidence: Bishop on Marriage, Divorce and Separation, secs. 1057, 1058.

The defendant called no witness and in no way weakened the *prima facie* proof of such marriage. Of course, the jury might have disbelieved the testimony, and doubtless the judge, on request, would have submitted the fact of marriage to the jury, instead of assuming it as proved by undisputed testimony, but he was not asked to do so and no exception was taken to the charge. The exception was to his refusal to charge that the "same proceeding" was necessary "to make a common-law marriage as was entered into before disability was removed." This seems to mean that a ceremonious marriage was requisite, and, of course, the judge properly refused the request.

I find no error in this judgment.

RAILROADS—NEGLIGENCE—DUTY TO LOOK AND LISTEN. A traveler, in attempting to cross a railway track, is generally under a duty to look and listen, and if he fails so to do he is guilty of contributory negligence: Note to Mack v. South Bound R. R. Co., 68 Am. St. Rep. 929; Phillips v. Detroit etc. Ry. Co., 111 Mich. 274. 68 Am. St. Rep. 392. That a traveler is not ordinarily under such a

duty, see *Atchison etc. R. R. Co. v. Hague*, 54 Kan. 234, 45 Am. St. Rep. 278. As applied to a passenger, however, in entering or alighting from a car and crossing a railroad track, a failure to look and listen is not necessarily negligence: *Warren v. Fitchburg R. R. Co.*, 8 Allen. 227, 85 Am. Dec. 700. That he may be guilty of negligence in failing to look and listen, see *Gonzales v. New York etc. R. R. Co.*, 38 N. Y. 440, 98 Am. Dec. 58.

MARRIAGE BY CONTRACT.—Marriage is a civil contract, to the validity of which the consent of parties able to contract is all that is required by natural law. If the contract is made *per verba de praesenti*, and remains without cohabitation, or is made *per verba de futuro*, and is followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary: *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419; *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404.

WEST JERSEY AND SEASHORE R. R. Co. v. WELSH.

[62 NEW JERSEY LAW, 655.]

MASTER AND SERVANT.—SERVANT'S IMPLIED AUTHORITY is inferred to do all those things that are necessary for the protection of the property intrusted to him or for fulfilling the duty which he has to perform for his master.

RAILROAD COMPANIES—IMPLIED AUTHORITY OF EMPLOYEE.—A railroad brakeman, or other employé, on a freight train, has implied authority to eject a trespasser therefrom.

RAILROAD COMPANIES—IMPLIED AUTHORITY OF EMPLOYEES.—The implied authority of a railway brakeman, or other employé on a freight train, to eject trespassers therefrom is not overcome by express authority given by the company to freight conductors to exclude trespassers from its trains and not to permit unauthorized persons to ride thereon.

RAILROAD COMPANIES—LIABILITY FOR EXPULSION OF TRESPASSER FROM TRAIN.—If injury to a trespasser upon a freight train is caused by the use of excessive and unnecessary or inappropriate force by a train brakeman in ejecting him therefrom, the company is liable therefor.

J. H. Gaskill, for the plaintiff in error.

H. Carrow, for the defendant in error.

656 **MAGIE, C. J.** The record returned with this writ of error discloses an action of tort by Welsh (an infant suing by a next friend), who is the defendant in error, against the West Jersey and Seashore Railroad Company which is the plaintiff in error. The declaration charged that the company, by its servants, assaulted Welsh while riding on a freight train of the company, and willfully and maliciously threw him from the train

while it was in motion, whereby he was injured. The plea was the general issue. The case was tried in the Camden circuit and resulted in a verdict for Welsh, on which judgment has been entered in the supreme court.

The action shown by the pleadings was against a corporation for an assault and battery committed by it by its servants.

The bills of exception show that at the close of the evidence for Welsh it plainly appeared that he was a trespasser upon the freight train in question, having got on it for the purpose of stealing a ride without right or permission. But the jury could also find that a person in the employ of the company and one of those in charge of the freight train, and either a conductor or brakeman, kicked Welsh off the train while it was in motion and that serious injury to him resulted therefrom.

At the close of Welsh's evidence a motion to nonsuit was made and denied, and an exception was allowed and sealed to the denial, which is made the ground of one of the assignments of error.

The motion to nonsuit was pressed upon the ground that to make out the action shown in the declaration the evidence must satisfactorily establish that the act which occasioned Welsh's injury was done by the authority of the company, either express or implied, and the contention was that, there being no evidence of express authority, there was no justifiable inference from the evidence that the servant, whether ⁶⁵⁷ conductor or brakeman, in ejecting Welsh from the train, had implied authority so to do.

At the close of Welsh's case the only evidence from which an implication of such authority could be claimed was that the person who kicked him off the train was an employe of the company and one of those in charge of the train.

But after the refusal to nonsuit, the company proceeded to call witnesses, and their evidence appears in the bills of exception. From that evidence it appears that the train in question was in charge of a freight conductor and several brakemen and that whatever was done to Welsh must have been done by a brakeman named Selah. It was also made to appear that it was customary for such conductors and brakemen to exclude from freight trains persons attempting to ride thereon and to expel them from the trains if they had intruded thereon.

All pertinent evidence exhibited in the bills of exception must be considered in reviewing the denial of a motion to nonsuit, for if, when made, there was a failure of proof in some respect and the defect was supplied in the evidence afterward adduced, the

error of the refusal will not lead to a reversal of the judgment: Delaware etc. R. R. Co. v. Dailey, 37 N. J. L. 526; May v. North Hudson County Ry. Co., 49 N. J. L. 445; Monmouth Park Assn. v. Warren, 55 N. J. L. 598.

In the argument in the trial court and here the contention that the evidence in this case did not justify the inference that the servant of the company had authority to eject Welsh from the train was deemed to be supported by the authority of our supreme court in Brokaw v. New Jersey R. R. etc. Co., 32 N. J. L. 328, 90 Am. Dec. 659. But this involves a misconception of what was decided in that case. The question there considered arose upon a demurrer to a declaration charging a corporation with assault and battery, substantially identical with the declaration contained in the record before us. It was decided that an action for assault and battery would lie against a corporation, and that a demurrer to a charge that a ⁶⁵⁸ corporation committed assault and battery by a specified servant admitted that such servant had competent authority from the corporation.

Questions involving analogous principles have been considered in our courts, and it is now thoroughly settled here, as elsewhere, that corporations are liable for torts which they may commit by agents, and that the pertinent inquiry when such liability is charged is: 1. Whether the act in question is one within the scope of the corporate powers; and 2. Whether it was done by a person who was the agent of the corporation in doing it: McDermott v. Evening Journal etc., 43 N. J. L. 488, 39 Am. Rep. 606; Evening Journal Assn. v. McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; Hoboken etc. Co. v. Kahn, 59 N. J. L. 218, 59 Am. St. Rep. 585; Dock v. Elizabethtown Steam etc. Co., 34 N. J. L. 312.

Upon the case presented by the evidence it is obvious that the company had the right to remove from its freight train Welsh, who was a trespasser thereon, which right grew out of its corporate authority to manage and run such trains. As it could only eject such a trespasser by agents, it could lawfully employ such agents for that purpose.

The company could intrust the ejection of such a trespasser to one or more of its servants by a particular direction in a particular case or by general instructions respecting a class of trespassers. Authority thus expressly given would charge the company with liability for the act of a servant in ejecting a person not a trespasser, or in using excessive or inappropriate force in

removing one who was a trespasser, and this notwithstanding the authority conferred was limited to the removal of trespassers, and the use of any but reasonable and necessary force was prohibited. The responsibility of the corporation is that of a master, who, under the maxim *respondeat superior*, must answer for injuries done by acts of his servant in the prosecution of his business and within the scope of his employment: *Driscoll v. Carlin*, 50 N. J. L. 28.

Authority which could thus be expressly conferred upon a servant may, no doubt, be implied to have been conferred from the nature and circumstances of his employment. The inference of implied authority thus arising, it is obvious that ~~and~~ it is difficult, if not impossible, to formulate rules upon the sufficiency of evidence to establish such authority. In general, it may be said that, when the act which occasioned the injury for which the master is sought to be charged is shown to have been done by the servant in the course and within the scope of his employment, then the implied authority is inferable: *Aycrigg v. New York etc. R. R. Co.*, 30 N. J. L. 460. This rule solves most of the questions arising in such cases. But when we are required to determine what evidence will establish implied authority to a servant to make use of force and violence upon the person of another, a more difficult question is presented and one not easy of solution.

I have found no more satisfactory statement of the principle to be applied to the solution of such a question than that enunciated by Mr. Justice Blackburn in delivering his judgment in *Allen v. London etc. Ry. Co.*, L. R. 6 Q. B. 65. In that case the plaintiff had been arrested at the instance of a booking clerk of the defendant upon the charge that he had attempted to rob the till at the defendant's station where that clerk was in charge. The charge against plaintiff was heard by a magistrate and dismissed. His action against the defendant company was for assault and false imprisonment, and the question before the queen's bench was whether the act of the booking clerk was within an implied authority of the company, for which it was liable. The principle which the learned justice declared was this, viz., that implied authority in a servant would be inferred to do all those things that were necessary for the protection of the property intrusted to him or for fulfilling the duty which he has to perform. From that principle applied to the case he held that the defendant company would have been liable if the arrest had been made to prevent the plaintiff from stealing the

money of the company from the till in charge of the clerk, or to recover from the plaintiff money actually stolen therefrom. But he also held, and in this he was supported by the other judges who heard the case, that no implied authority from the company was disclosed by the ⁶⁶⁰ evidence to take into custody a person who had unsuccessfully attempted to rob the till, as that act was unnecessary for the protection or recovery of the property of the company which the clerk had in charge: *Poulton v. London etc. Ry. Co.*, L. R. 2 Q. B. 534; *Goff v. Great Northern Ry. Co.*, 3 El. & E. 672; *Roe v. Birkenhead etc. Co.*, 7 Eng. L. & Eq. 546.

I am prepared to adopt and apply to the present case the principle laid down by Mr. Justice Blackburn. Looking at the evidence we find that the company had intrusted its property, the freight train, to the custody and care of its servants, the conductor and brakeman. These servants were in charge of the property, conducting it to its destination. It was not a train for passengers who might claim a right to ride upon paying fare. Whoever entered the train to steal a ride was a trespasser whom the company could eject. It was customary for such servants of the company to exclude and eject such trespassers from such trains. This evidence justifies the inference that implied authority was conferred on such servants to eject such a trespasser as Welsh for the protection of the property intrusted to them and for fulfilling the duty to their employer.

This result is, in my judgment, confirmed by a consideration of the liability of Selah, the brakeman, for such an act. Suppose the train had been at a standstill, and that Selah, without unnecessary force, had removed Welsh therefrom, I do not think it admits of a doubt that Selah could have justified his act, in a suit against him by Welsh for assault and battery, without proof of any express authority from the company to expel intruders from freight trains, but solely by the authority inferred and implied from his custody of the property and his duty to his employer. From this it follows that there was no injurious error in the refusal to nonsuit.

The bills of exception show that thereafter the company introduced in evidence its printed instructions to its freight conductors and brakemen respecting their duties. It thereby appeared that a freight conductor was charged with responsibility ⁶⁶¹ for the vigilance and conduct of the men employed on the train, and was required, among other things, "not to permit unauthorized persons to enter the cars or handle freight or ride

upon the train." Brakemen were therein instructed that, when on duty, they were under the direction of the conductor, and required, among other things, to assist him in all things necessary for the safe and prompt movement of the train. There was nothing therein giving authority to brakemen in respect to unauthorized persons riding upon such trains, nor was authority in respect thereto interdicted to them, unless that resulted from the express grant of authority to the conductor.

At the close of the case the company did not ask a direction for a verdict, but submitted many requests to charge. From them we may fairly discover that the trial judge was asked to submit to the jury the question whether, upon the whole evidence, it appeared that authority to remove trespassers from freight trains had been conferred upon Selah, the brakeman.

The charge of the trial judge assumed that the right of the company to remove such trespassers had been conferred upon and could be exercised by any of the employes on the freight train. It was left to the jury to determine whether Selah's act was done in the exercise of his employment or from a malicious personal motive arising from a bad heart and anger at Welsh, apart and distinct from his duty to his employer.

There was a refusal to charge the requests otherwise than charged, an exception thereto, and error has been assigned thereon.

It is now contended that there was error in the refusal to charge the request above specified on the ground that the instructions introduced in evidence, properly construed, gave express authority to freight conductors to exclude from freight trains unauthorized persons riding thereon, and to expel and remove such persons, and that such express authority was exclusive in him on whom it was conferred and implied an interdiction of its exercise by others, and it is argued that the evidence from which, as we have seen, we think an inference ⁶⁶³ of implied authority in the brakeman could be drawn, was thereby contradicted and overcome by proof that such authority was in fact withheld from such employes.

That the instructions to the freight conductors gave them authority to remove any unauthorized person riding on a freight train seems not capable of doubt, and such was the view taken of such instructions in *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171.

But the contention that the express grant of authority to the conductor interdicts the brakeman from the exercise of a similar

authority implied from their employment, and so overcomes evidence of such implied authority, is not, in my judgment, to be acceded to.

It is ingeniously argued that the exercise of the power of the company to remove trespassers from its trains is of a delicate and responsible character. The servant to whom such authority is given must determine who are trespassers, and, in expelling trespassers, he must take care to use only such force as is not excessive in degree or inappropriate in kind. Mistakes by the servant in these respects will render his master liable, and for this reason the employer may well desire to commit this nice duty to a competent and proper person.

It must also be conceded that no question of estoppel arises, as might be the case upon a contract made with an agent clothed with apparent authority. The question is as to express or implied authority to do an act in respect to Welsh, with whom the company had no contract relation and to whom it owed no duty except to refrain from willful injury.

Nor is there any question here of the duty arising from the relation of passenger and carrier which this court has lately considered. The distinction between the liability for a breach of that duty and the liability of a master for his servant's acts is pointed out in the able opinion of Mr. Justice Depue, in *Haver v. Central R. R. Co.*, 62 N. J. L. 282, ante, p. 645.

But notwithstanding these considerations, I find myself unable to concede that the authority to remove trespassers from freight trains, which, as we have seen, is implied to ~~ees~~ have been conferred on those put in charge of such trains, has been either abrogated or annulled by the instructions which gave express authority to that effect to the freight conductor. If he had acted under that authority, the liability of the company would not have been in any respect diminished by its conditioning its grant of authority upon its being properly exercised. So, when the company committed to the conductor and his crew of brakemen the custody and care of its freight train, and thereby gave implied power to exclude and expel therefrom any unauthorized persons intruding thereon in contravention of the design and purpose of the company in running such a train, I think that the implication is not rebutted by proof that it had selected one of its servants and given him express authority in respect to such trespassers. The express grant is not inconsistent with the implied authority. The illustration heretofore used is again pertinent. Suppose Selah had removed Welsh from

the train when it was not in motion and without excessive force, can it be doubted that he could have justified his act, in defense of an action for assault and battery, upon his implied authority to protect his master's property, and that his justification would not be negatived by proof that the company had given express authority to the conductor in respect to trespassers?

The result is that the refusal of the request to charge in the respect complained of was not erroneous. There was no exception to the charge.

There are other assignments of error which have not been argued. As they are directed to rulings of the trial judge in matters committed to his discretion and which are not reviewable on error, they need not be further discussed.

For the reasons given, I shall vote to affirm the judgment.

MASTER AND SERVANT—IMPLIED AUTHORITY OF SERVANT.—While a master is liable only for such wrongs of his servant as are committed in the course of the employment and for the master's benefit, yet the scope of such employment may be implied from its nature and the end to be accomplished: *Ephland v. Missouri Pac. Ry. Co.*, 137 Mo. 187, 59 Am. St. Rep. 498.

RAILROADS—IMPLIED AUTHORITY OF BRAKEMAN.—A brakeman upon a railroad train has no implied authority to eject a trespasser from the cars; and in an action against the railroad company, the burden of proof is upon the party injured to show that in ejecting him the brakeman acted within the scope of his authority: *International etc. Ry. Co. v. Anderson*, 82 Tex. 518, 27 Am. St. Rep. 902.

RAILROADS—LIABILITY FOR EXPULSION OF TRESPASSER FROM TRAIN.—A railroad company is liable for the willful act of its brakeman within the scope of his authority in putting a trespasser off its train: *Illinois etc. R. R. Co. v. King*, 179 Ill. 91, 70 Am. St. Rep. 93, and note; *Savannah etc. Ry. Co. v. Godkin*, 104 Ga. 655, 69 Am. St. Rep. 187.

NICOLL v. NEW YORK AND NEW JERSEY TELEPHONE COMPANY.

[62 NEW JERSEY LAW, 733.]

SERVITUDES—TELEPHONE LINE IN HIGHWAY.—The right to erect poles and place wires and other fixtures for telephonic purposes along a public street or highway, wherein the fee of the land belongs to private persons, imposes an additional servitude, and can be acquired against the consent of such persons only under the power of eminent domain.

EMINENT DOMAIN—CONSTRUCTION OF STATUTE.—Under the New Jersey eminent domain statute, it is not absolutely

necessary to the jurisdiction of the court to which an appeal from an award has been taken that the appellant should, within ten days after filing the petition of appeal, give written notice thereof to the opposite party as required by the statute. Such requirement is directory and not mandatory.

S. H. Little, for the plaintiffs in error.

J. B. Vreeland and G. T. Werts, for the defendant in error.

⁷³⁴ DIXON, J. This writ of error brings up a judgment of the supreme court dismissing a writ of certiorari sued out by the plaintiffs in error on the following state of facts: The plaintiffs in error are owners of lands in Morristown, fronting on Sussex avenue and having for their southerly boundary the middle of the avenue. In 1896, the defendant in error commenced proceedings, under the telegraph and telephone companies act of June 20, 1890 (Gen. Stats., p. 3460), to acquire a right to place poles and wires for a telephone line on the plaintiff's land in said avenue. According to the order made in said proceedings, the commissioners' appraisal of damages was to be filed, and in fact was filed, by May 1, 1897, and on May 4, 1897, the defendant filed with the circuit court of Morris county a petition of appeal from said appraisal, but failed to serve notice of appeal upon the plaintiffs until August 27, 1897. Notwithstanding this failure the chief justice, sitting in said circuit, made the order for trial, et cetera, prescribed by the third section of the eminent domain act of March 9, 1893 (Gen. Stats., p. 1386), but allowed a certiorari to test the legality of the order.

The legality of the order is denied by the plaintiffs, because written notice of the appeal was not served upon them within ten days after the filing of the petition of appeal, as directed by said act of 1893, but the certiorari was dismissed by the supreme court upon the ground that the proceedings were not governed by that act, because the acquisition of the right sought by the defendant was not "the taking of property for public use," to which alone the act of 1893 is applicable.

The language of the act of 1893 is evidently borrowed from the constitutional injunction that "private property shall not be taken for public use without just compensation," ⁷³⁵ and clearly expresses a purpose to regulate the procedure for all cases within the scope of that injunction, since it enacts that "all acts or provisions inconsistent with the provisions of this act shall be and are hereby repealed, and the practice prescribed by this act shall supersede the existing practice in all condemna-

tion cases before commissioners or on appeal, so far as the provisions of this act shall extend."

We must, therefore, consider whether the acquisition by a telephone company of a right to erect poles and place wires and other fixtures for telephonic purposes along a public street, wherein the fee of the land belongs to private persons, without the consent of such persons, is the taking of private property.

If the land were not subject to the easement of a public street, the matter would not be debatable; but it is equally clear that, whenever the property of the owner of the fee in a highway is subjected by law to an additional servitude, it is taken, within the meaning of the constitution. The contention, therefore, must be over the question whether the right thus to be acquired would be an additional servitude upon the fee, or is embraced within the public easement, and hence grantable by the public for public use without regard to the owner of the fee.

The public easement, as interpreted in this state, is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travelers while using the way. Secondly, the easement covers uses which, though their relation to the right of passage is remote, or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent and custom than by logical deduction from the primary design, they are now recognized as legitimate. Such are the ⁷³⁶ construction and maintenance of sewers, water pipes, and gas pipes for the convenience of persons occupying neighboring lands: *State v. Laverack*, 34 N. J. L. 201.

The argument to support the proposition that the right to construct and maintain a telephone line for common public use is within this easement is that the structures required for the exercise of the right are mere adaptations of the road to the passage of the electric current, which thus travels along the highway.

But the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the words by which it may be described. In reality, the electric current does not use the highway for passage—it uses the wire—and

would be as well accommodated if the wire were placed in the fields or over the houses; the highway is used only as a standing place for the structures. Such a use seems to us to be so different from the primary right of passage as to be essentially distinct. Nor does it rest on the same footing as those secondary uses to which allusion has been made. Telephone lines in a street do not afford to the occupants of neighboring property such general convenience, nor have they been permitted with such common and continued acquiescence, as sanction the other uses mentioned.

We therefore think that the right now under consideration is not within the public easement, and can be acquired, against the consent of the private owner of the fee only by condemnation under the power of eminent domain.

To this effect has been the trend of judicial opinion in this state: *Turnpike Co. v. News Co.*, 43 N. J. L. 381; *Broome v. New York etc. Teleph. Co.*, 49 N. J. L. 624; *Duke v. Central etc. Teleph. Co.*, 53 N. J. L. 341; *Marshall v. Bayonne*, 59 N. J. L. 101; *Halsey v. Rapid Transit Ry. Co.*, 47 N. J. Eq. 380, 393; *Paterson Ry. Co. v. Grundy*, 51 N. J. Eq. 213, 225. Our legislation also has seemed to rest on the same opinion.

We deem it unnecessary to discuss the views of courts in other jurisdictions—they are irreconcilable; and those on each ⁷³⁷ side may be found cited in *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358, where the supreme court of Indiana arrived at a conclusion opposed to that above expressed.

The question therefore arises whether, in view of the act of 1893, the writ of certiorari was properly dismissed. This question is treated in the argument before us as depending upon the power of the circuit court, or a judge thereof, to make an order for the trial of the appeal in a case where the appellant has not given to the other party written notice of the appeal within ten days after filing the petition.

Without stopping to inquire whether there exist any technical objections to the review of such an order by certiorari and before the final determination of the appeal, we will consider the matter as it has been presented.

The case of *Proprietors of Morris Aqueduct Co. v. Jones*, 36 N. J. L. 206, *Jones v. Morristown etc. Co.*, 37 N. J. L. 556, is urged as a controlling authority in favor of the plaintiffs in error. The principle laid down in that case is that, in considering whether a statutory prescription is mandatory or merely

directory, the legislative will must be ascertained, not from the meaning of the text of the statute alone, but from such words interpreted in view of the general object of the particular act. On that principle, the court concluded that the requirement of notice was, according to the law then sub judice, mandatory.

There is, however, an obvious distinction between that case and this. There the notice required was clearly made a condition precedent to the jurisdiction of the court over the appeal, the words of the act being "which petition and notice so served or published shall vest in said court full power to hear and determine said appeal." Here the requirement of notice presupposes an appeal taken and jurisdiction over the subject matter vested in the court, for the notice is to set forth that an appeal has been taken, and the statute expressly authorizes the judge of the court to which the appeal is taken to direct how, in certain contingencies, the notice shall be given.

In cases like the former, the statute must be held mandatory, ⁷³⁸ for there is no impartial tribunal to lay down a rule in accordance with the spirit, though not the letter, of the law, if it be deemed directory only, while in the other class of cases judicial discretion may be invoked to determine, first, whether the statute demands exact compliance with its terms, and if not, what will amount to substantial compliance in view of the main purpose of the legislation.

No doubt if the legislature, within the range of its power, has evinced an intention to make the lawful continuance of a cause in court, or the lawful interposition of a defense to such a cause, dependent on strict obedience to the rule which it prescribes, courts, as well as parties, are bound thereby, but, in deciding whether such an intention appears, there is always present the presumption of a legislative design that courts shall administer justice in pending causes and regulate their practice to that end.

When, with this presumption, we examine the statute under review, the requirement of a written notice within ten days after filing the petition of appeal does not seem to be absolute and imperative. This appears: 1. From the provision that, when the party to be notified cannot be found in the state, the judge of the court may direct a substituted notice to be given; and 2. From the provision that "the court shall make such further orders and take such further proceedings as may be requisite according to the practice of the court, . . . and may permit such amendments of the proceedings . . . as may be reasonable and proper for the fair trial of the case."

These clauses indicate that the chief object of the legislature was to secure a fair trial for the litigants when once the case was brought into court, and that, while it regulated the practice for cases which presented no exceptional features, its rules were not meant to be inflexible, but were subjected to the judicial discretion of the court when special circumstances intervened which would render their strict enforcement subversive of the main design.

Under what special circumstances the chief justice made ⁷³⁹ the order now in question, notwithstanding the lack of written notice given within the time limited, the state of the case before us does not disclose, and therefore we must assume that they were such as called for the exercise of judicial discretion. That discretion cannot possibly be reviewed without knowledge of the matters with which it dealt.

Our conclusion is that the writ of certiorari was rightly dismissed.

SERVITUDES--TELEPHONE POLES IN STREET.—When the fee in the bed of a street or highway is in the abutting landowner, the planting of a telegraph or telephone pole therein is an additional servitude imposed upon the land, for which such owner is entitled to compensation, of which he cannot be deprived by statute: *Chesapeake etc. Teleph. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, and extended note thereto. See, also, *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 69 Am. St. Rep. 286.

EMINENT DOMAIN.—STATUTES CONFERRING POWER to exercise the right of eminent domain are to be construed strictly, and unless both the letter and the spirit of the statute relied upon clearly confer the claimed power, it cannot be exercised: *Ligare v. Chicago*, 189 Ill. 46, 32 Am. St. Rep. 179.

CADWALLADER v. HIRSHFELD.

[62 NEW JERSEY LAW, 747.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT PRIOR TO PAYEE'S.—Although the indorsement of a person on a note, prior to that of the payee, standing alone, does not imply any contract on the part of the indorser on account of such signature, yet the note, upon proof of its execution and indorsement, is admissible in evidence as the basis of proof of the real contract of the parties thereto.

NEGOTIABLE INSTRUMENTS—INDORSEMENT PRIOR TO PAYEE.—Whether the contract of one whose indorsement on a note, made prior to the payee's, is that of a second indorser, or of a maker or surety, is a question for the jury, when there is evidence tending to sustain both conclusions.

TRIAL—DIRECTING VERDICT.—The only question which the trial court can determine upon a motion to direct a verdict for the defendant is whether there is any evidence to go to the jury to support a verdict for the plaintiff.

APPELLATE PRACTICE.—CREDIBILITY OF EVIDENCE, the meaning and force thereof, and its sufficiency, are questions for the jury, and, upon a writ of error or appeal, its determination cannot be interfered with.

S. C. Mount, for the plaintiff in error.

B. B. Hutchinson, for the defendant in error.

⁷⁴⁷ LIPPINCOTT, J. This action was by Jacob B. Hirshfeld, trading as J. B. Hirshfeld & Co., as plaintiff, against Charles ⁷⁴⁸ McM. Cadwallader as defendant, to recover the amount due on a promissory note, of which the following is a copy, with the indorsements thereon:

“294.70-100.

July 29, 1897.

“One month after date I promise to pay to the order of J. B. Hirshfeld and Co. two hundred and ninety-four 70-100 dollars, at People’s Bank. New York City. Value Received.

“E. M. CADWALLADER.”

Indorsed:

“C. McM. Cadwallader.

“J. B. Hirshfeld & Co.”

The declaration contained the common counts, with a bill of particulars, containing a copy of this note, annexed. The plea of the defendant was the general issue, but at the trial leave was given to the plaintiff to amend, upon the objection made by the defendant upon the offer of the note in evidence, by incorporating a special count in the declaration to charge the defendant with liability as a maker or surety on the note. After this the trial was had upon the basis of this amendment. Whether the amendment was necessary to make or not, it resulted in no surprise to the defendant and was entirely within the discretion of the court. No motion or application was made for any postponement of the trial to meet the proof to be offered under the amended declaration, and mention is only made of the matter because, under the objection and exception in respect to this question, a contention is made that there could be no recovery in this action upon a declaration containing only the common counts. Upon the record as it stands this exception can be of no avail. In fact, it would be within the power of this court to make the amendment if the whole case had been presented upon its merits, as appears to have been the case here upon the trial.

It has been decided in this court that, upon such a promissory note as the one sued on appears to be, no liability arises⁷⁴⁹ impliedly or expressly against a party whose signature appears so irregularly thereon. The signature thereon is not formally in the place and order to give rise to the application of the rules of law governing the liability of parties upon ordinary commercial paper. Whilst the promissory note may be the basis of the action, no contract whatever of liability to the payee against such indorser arises: *Chaddock v. Van Ness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Building etc. Assn. v. Leeds*, 50 N. J. L. 399. See dissenting opinion of Mr. Justice Dixon in the latter case.

An objection was made and exception sealed to the formal admission of the note in evidence by the trial court, on the ground that it was not a binding contract between the parties upon which recovery could be had against the defendant. The signatures, including that of the defendant on the back thereof, were duly proved, and there was no objection upon that score, and the note was admitted after the evidence of the plaintiff had been introduced showing the circumstances under which it was signed.

It is not observed how the note could have been excluded. In all cases of this character the promissory note has been admitted as the basis of the action, and to which the parol or extrinsic evidence as to whether any contract existed is to be applied, and, if any contract be proved, the character thereof. Whether a contract be proved at all in connection with the note, by the extrinsic facts, or any liability to the plaintiff arises by reason of such facts and circumstances, is a question to be subsequently determined. A contract ambiguous in its terms is admissible in evidence, and, whether susceptible or not of parol or extrinsic evidence in explanation, reason is afforded for its rejection as evidence. No error exists in the formal admission of the promissory note in evidence in the case: *Chaddock v. Van Ness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Building etc. Assn. v. Leeds*, 50 N. J. L. 399.

By these cases also the procedure of the trial justice in admitting parol or verbal extrinsic evidence, to show what the real agreement and intention of the parties were, has been fully sanctioned.

⁷⁵⁰ The defendant at the trial, under the evidence, contended that no contract whatever existed between the parties to the note as to the liability of the defendant; or if any ex-

isted it was that of a second indorser with reference to the payee, and that therefore, also, the defendant was not liable, and that a verdict should be directed for the defendant, and, upon the refusal of the trial justice to so direct, an exception was signed and sealed.

The plaintiff contended that by the evidence the contract of the defendant was that of a maker or surety, and that, therefore, the defendant was liable to the payee for the amount thereof.

The learned trial justice submitted these questions to the jury and proper instructions as to the principles of law applicable to each class of contracts arising, and the jury returned a verdict for the plaintiff against the defendant for the amount of the note and interest.

There were but two witnesses sworn—Mr. Hirshfeld, for the plaintiff, and the defendant. Mr. Hirshfeld testified that he saw the defendant write his name on the back of the note; that at that time one E. M. Cadwallader, who was the brother of the defendant, was quite largely indebted to the plaintiff and had asked for forbearance or extension of time in which to pay, which the plaintiff agreed to give him if he could find some acceptable person to become bound with him on this and other notes; that at the time the note was signed by the defendant he asked what it was for, and was told by his brother that it was to secure the plaintiff company for an extension of time and forbearance in other respects; that the defendant said at the time that he supposed he would have to pay the notes. Besides this evidence a written paper or receipt was given by the plaintiff company to E. M. Cadwallader, to which the defendant was a witness, acknowledging the receipt of this and other notes in settlement of the claims of the plaintiff company against E. M. Cadwallader, and agreeing to extend ⁷⁵¹ the notes for two months longer if one-half of each note should be paid at maturity and of each renewal thereof.

The defendant testifies that the first time he saw this note was when his brother, E. M. Cadwallader, and Mr. Hirshfeld met at the carriage factory of the defendant company at the time of signing of this and other notes. He says that he put his name on the back of the note at the request of his brother, as a favor to him; that the notes were drawn when he got there and the meeting was by appointment. He testifies that his brother had seen him previously and asked him to indorse the notes as a favor to him, which he promised to do; he drew the

receipt to which reference has been made and witnessed it; he wrote his name on the back of the notes and handed them to Mr. Hirshfeld; he says his reason for indorsing them was that his brother wanted time to pay his indebtedness to the plaintiff company, and that if he indorsed them the matter could be arranged; he denies that he said he supposed he would have to pay them; he says he expected that the plaintiff company was to write its name above his and that he was to be the second indorser.

The objection taken is that, under this evidence, there should have been a verdict directed for the defendant. The trial justice submitted the facts to the jury to determine, first, whether there was any contract whatever; if none, then the verdict should be for the defendant; and, if there was a contract, whether the liability of the defendant was that of maker of the note or surety which entitled the plaintiff to recover, or whether it was that of a second indorser, and, if the latter, then also a verdict should be rendered for the defendant. The trial justice clearly defined the legal effect and meaning of these terms to the jury, and the character of the contract of a maker, surety, or indorser, of a promissory note.

No error can be found in this submission of the facts and circumstances to the jury. The weight and credibility of the evidence, the facts, and circumstances existing, are questions for the jury to determine under general rules requiring facts to be submitted to the ⁷⁵² jury; and, even where facts and circumstances are not in dispute, it often becomes the province of the jury to give meaning to them where more than one meaning can reasonably be ascribed to them, or where, in a given case, two conclusions of fact can be reasonably reached. The trial justice did, according to the request of the defendant, instruct the jury that, in order to determine liability against the defendant, they must find from the facts of the whole transaction that the agreement between the parties was that the defendant signed this note, by whatever name or appellation it was done, as a maker thereof or surety thereon, and it certainly was not the province of the trial court, under the facts, to conclude, as matter of law, what the relation was which existed between the plaintiff and defendant upon the note.

There was evidence from which liability of the defendant as maker or surety could be found or imposed. There was evidence tending to show that he intended to become bound as a maker or surety on the note.

There was other evidence tending to show that he only intended to become bound as a second indorser, and therefore not liable to the plaintiff.

It was the clear duty of the trial justice to submit these questions to the jury, and their determination was reasonably based upon the facts and cannot be disturbed upon error.

The law of this case has been so fully discussed in the cases of Chaddock v. Van Ness, 35 N. J. L. 517, 10 Am. Rep. 256, and in Building Assn. v. Leeds, 50 N. J. L. 399, as to make repetition entirely unnecessary.

The judgment in the supreme court must be affirmed, with costs.

TRIAL—DIRECTING VERDICT.—Where there is no evidence to warrant the jury in finding a material fact, the judge is not at liberty to leave it to them to determine whether or not such fact is proved; but he should direct them to find that it is not proved: Storey v. Brennan, 15 N. Y. 524, 69 Am. Dec. 629; Schuermann v. Dwelling House Ins. Co., 161 Ill. 437, 52 Am. St. Rep. 377.

APPEAL—CREDIBILITY OF EVIDENCE.—The appellate court will not disturb a finding of the jury on a question as to the credit which ought to be given to the evidence: Henry v. Sioux City etc. Ry. Co., 75 Iowa, 84, 9 Am. St. Rep. 457.

Negotiable Instruments—Effect of Indorsement by Stranger before Delivery.

As to the nature of the liability of one who places his name upon a negotiable note before its delivery to the payee, there is considerable diversity of opinion among the courts of the different states. In some jurisdictions such an indorser is regarded, *prima facie* at least, as a guarantor, in others as an indorser merely, and in others as a joint promisor. The majority of the cases hold such an indorser to be a joint maker or surety, and that his liability is different from that of an indorser or guarantor. This rule prevails in the following states and jurisdictions:

United States Courts.—A third person who places his name upon the back of a negotiable note at the time of its execution by the maker, and before its delivery to the payee, is presumed to have done so as the surety of the maker, for his accommodation, and to give him credit; and, if such presumption is not rebutted, he is liable on the note as a joint maker: Good v. Martin, 95 U. S. 90; First Nat. Bank v. Lockstitch Fence Co., 24 Fed. Rep. 221. The question of the liability of such an indorser is one of general commercial law, and the decision of the state court in which the note is executed and made payable is not necessarily binding in the decision thereof by a federal court: First Nat. Bank v. Lockstitch Fence Co., 24 Fed. Rep. 221.

Arkansas.—Parties who indorse their names in blank upon negotiable paper at the time it is executed, or before it is delivered to

the payee, are joint makers and not guarantors or indorsers, and not entitled to protest, demand, or notice: *Killian v. Ashley*, 24 Ark. 511, 91 Am. Dec. 519; *Nathan v. Sloan*, 34 Ark. 524; *Heise v. Bumpass*, 40 Ark. 545; *Scanland v. Porter*, 64 Ark. 470.

Colorado.—One who writes his name on the back of a note at the time it is made and before delivery to the payee is presumed to have done so, from that act alone, with intent to serve the maker by becoming surety for him, and he is liable as a joint maker: *Good v. Martin*, 1 Colo. 165, 91 Am. Dec. 706; *Tabor v. Miles*, 5 Colo. App. 127. But to charge him as maker it is necessary to show specifically that he put his name on the note before delivery to the payee: *Rest v. Hopple*, 3 Colo. 137.

Delaware.—The indorsement in blank on the back of a negotiable note, not negotiated before delivery to the payee, by one who has no interest in, nor connection with, it, apparent on the face of it, but for whose accommodation it was drawn, and who indorses it before delivery to the payee, constitutes such indorser an absolute and original promisor on the note, or joint maker of it, and not a mere commercial indorser: *Massey v. Turner*, 2 Houst. 79; *Gilpin v. Marley*, 4 Houst. 284.

Florida.—A person not named as payee, who puts his name on the back of a note before delivery to the payee, upon the faith of which money is loaned or credit given by the payee to the maker, is liable as an original promisor, although it is proved that he indorsed the note as surety for the maker. His liability is that of a joint and several maker of the note: *Melton v. Brown*, 25 Fla. 461; *McCallum v. Driggs*, 35 Fla. 277.

Georgia.—One who signs a note on the back payable to payee or bearer before its delivery to the payee is liable as a maker jointly with the other makers: *Quin v. Sterne*, 26 Ga. 223, 71 Am. Dec. 204. In a late case in Georgia, it was held that the liability of such an indorser depends upon what was his real intention, as understood by the other parties at the time of the transaction, and he may show this when sued upon the note: *Atkinson v. Bennet*, 103 Ga. 508.

Louisiana.—When a person, not a party to a note, puts his name on the back of it when it is made, he binds himself as a surety or joint maker: *Rogers v. Gibbs*, 24 La. Ann. 467; *Penny v. Parham*, 1 La. Ann. 274.

Maine.—If one, not the payee of a negotiable note, indorses it in blank at the time of its inception and before delivery, he is regarded as an original promisor or joint maker: *Colburn v. Averill*, 30 Me. 310, 50 Am. Dec. 630; *Childs v. Wyman*, 44 Me. 433, 69 Am. Dec. 111; *Brett v. Marston*, 45 Me. 401; *Malbon v. Southard*, 36 Me. 147; *Leonard v. Wildes*, 36 Me. 265; *Woodman v. Boothby*, 66 Me. 389. The use of the words "waiving demand and notice" does not affect the liability of such indorser: *Bradford v. Prescott*, 85 Me. 482. Nor does the fact that he signs as "surety": *Rice v. Cook*, 71 Me. 559.

Maryland.—A person who indorses a negotiable note at the time it is executed and before it is delivered to the payee must be treated as a joint maker: *Schroeder v. Turner*, 68 Md. 506; *Wals v. Alback*, 87 Md. 404; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411.

Massachusetts.—If one, not the promisee, puts his name in blank on the back of a note before it is delivered to the promisee, he is an original promisor and surety: *Chaffee v. Jones*, 19 Pick. 260; *Sumner v. Gay*, 4 Pick. 311; *Austin v. Boyd*, 24 Pick. 64; *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311; *Pearson v. Stoddard*, 9 Gray, 199; *Patch v. Washburn*, 16 Gray, 82; *Spaulding v. Putnam*, 128 Mass. 363. And parol evidence is not admissible to vary the effect of such an indorsement: *Essex Co. v. Edmonds*, 12 Gray, 273, 71 Am. Dec. 758; *Allen v. Brown*, 124 Mass. 77; *Gilson v. Stevens Machine Co.*, 124 Mass. 546. A failure to demand payment of a person so signing a note at the maturity thereof, discharges an ordinary indorser: *Union Bank v. Willis*, 8 Met. 504, 41 Am. Dec. 541. If such person pays the note, he must pursue his remedy as surety, and not as indorser against the other promisor: *Chaffee v. Jones*, 19 Pick. 260.

Michigan.—One who indorses a note at the time of its execution and before delivery to the payee is liable as a joint maker: *Herbage v. McEntee*, 40 Mich. 337, 29 Am. Rep. 536; *Wetherwax v. Paine*, 2 Mich. 555; *Fay v. Jenks*, 78 Mich. 312; *Sibley v. Bank*, 41 Mich. 196; *Peninsular Bank v. Hosie*, 112 Mich. 351. It makes no difference whether the note is negotiable or not: *Rothchild v. Grix*, 81 Mich. 150, 18 Am. Rep. 171. And parol evidence is not admissible to vary the legal effect of such indorsement: *Gumz v. Giegling*, 108 Mich. 295.

Minnesota.—A person other than the payee, who, at the inception of a note and before delivery, for the purpose of giving credit to it, and to induce the payee to receive it, signs his name on the back thereof, even without any consideration to himself, is an original maker and joint promisor: *Pierse v. Irvine*, 1 Minn. 371; *Marienthal v. Taylor*, 2 Minn. 148; *McComb v. Thompson*, 2 Minn. 139, 72 Am. Dec. 84; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470; *Stein v. Passmore*, 25 Minn. 256; *Robinson v. Bartlett*, 11 Minn. 410. The legal effect of a blank indorsement on the back of a note before delivery by one not a party to it, is to make him an absolute maker or promisor. He is an absolute surety, and not a conditional one. The legal effect of his indorsement cannot be varied by proof of a parol agreement, made at the same time, that he was to be charged as an indorser, and not as a maker: *Dennis v. Jackson*, 57 Minn. 286, 47 Am. St. Rep. 603.

Mississippi.—If a note is indorsed before its delivery, the liability of the indorser is that of an original promisor and comaker: *Richardson v. Foster*, 73 Miss. 12, 55 Am. St. Rep. 481; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Thomas v. Jennings*, 5 Smedes & M. 627.

Missouri.—One writing his name on the back of a note, whether negotiable or not, to which he is not a party, and before delivery

to the payee, must be treated as a joint maker of the note, in the absence of evidence of a contrary intention: *Lewis v. Harvey*, 18 Mo. 74, 59 Am. Dec. 286; *Chaffe v. Memphis etc. R. R. Co.*, 64 Mo. 193; *Seymour v. Farrell*, 51 Mo. 95; *Powell v. Thomas*, 7 Mo. 440, 88 Am. Dec. 465; *Hooper v. Pritchard*, 7 Mo. 492; *Schneider v. Schiffman*, 20 Mo. 571; *Perry v. Barret*, 18 Mo. 140; *Boyer v. Boogher*, 11 Mo. App. 130; *Cayuga Co. Nat. Bank v. Dunklin*, 29 Mo. App. 442; *Schmidt Malting Co. v. Miller*, 38 Mo. App. 251. The person thus indorsing a note may repel such presumption, and show that he signed as indorser or guarantor, and not as a maker, and that such was the understanding of the parties at the time. But the burden of proof is upon him to make this defense: *Lewis v. Harvey*, 18 Mo. 74, 59 Am. Dec. 286; *Schneider v. Schiffman*, 20 Mo. 571; *Seymour v. Farrell*, 51 Mo. 95; *Cahn v. Dutton*, 60 Mo. 297; *Faulkner v. Faulkner*, 73 Mo. 328. The addition of the word "surety" to his indorsement, without more, will not relieve him from liability as comaker: *Goode v. Jones*, 9 Mo. 876.

Nebraska.—A third person who indorses a note in blank at the time it is executed and before delivery, is, as to a subsequent bona fide holder for value, liable thereon as a joint maker: *Salisbury v. First Nat. Bank*, 37 Neb. 872, 40 Am. St. Rep. 527.

New Hampshire.—One who signs his name on the back of a note at the time it is made and before it is transferred, is liable as an original promisor, and not as an indorser: *Martin v. Boyd*, 11 N. H. 385, 35 Am. Dec. 501; *Currier v. Fellows*, 27 N. H. 363.

North Carolina.—The indorsement by a third person of a note at the time of its execution binds the indorser, according to the intention of the parties, either as a joint principal or as a surety. The presumption is that he is a joint maker: *Baker v. Robinson*, 63 N. C. 191; *Hoffman v. Moore*, 82 N. C. 818; *Moore v. Carr*, 123 N. C. 425.

Ohio.—The liability of a third person who places his name upon a note at the time it is executed and before its delivery depends upon the consideration which supports the note in the hands of the holder, and, prima facie, is that of a surety of the maker, and he must be so held, unless he can show a different agreement between the parties, which he is entitled to do: *Ewan v. Brook etc. Co.*, 55 Ohio St. 596, 60 Am. St. Rep. 719; *Bright v. Carpenter*, 9 Ohio, 189, 34 Am. Dec. 432.

Rhode Island.—One who, as a surety, and before utterance, indorses a note payable to another, is liable to the payee as a joint maker, although the payee knew him to be a surety: *Carpenter v. McLaughlin*, 12 R. I. 270, 34 Am. Rep. 633; *Perkins v. Barstow*, 6 R. I. 505.

South Carolina.—If a third person, not a party to a note, indorses his name on the back thereof, and it is then delivered to the payee, such indorser is liable as a maker: *Baker v. Scott*, 5 Rich. 305; *Carpenter v. Oaks*, 10 Rich. 17; *McCreary v. Bird*, 12 Rich. 554;

Watson v. Barr, 37 S. C. 463; *Johnson v. McDonald*, 41 S. C. 81; *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 308.

Tennessee.—The indorser of commercial paper before delivery, on whose credit it is taken, is liable to the payee as a comaker: *Provident etc. Assur. Soc. v. Edmonds*, 95 Tenn. 53; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 36 Am. St. Rep. 100; *Logan v. Ogden*, 101 Tenn. 392.

Texas.—A third person signing his name on the back of a note at the time it is made, without anything to show the nature of his undertaking, is prima facie liable as an original promisor or surety, but he may show the precise nature of his undertaking by parol evidence: *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181; *Carr v. Rowland*, 14 Tex. 275; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223. In Texas, it has also been held that such an indorser was a guarantor: *Horton v. Manning*, 37 Tex. 23.

Utah.—A stranger to negotiable paper who places his name, without more, on the back thereof, before indorsement by the payee, renders himself, in the absence of proof, liable as surety or comaker: *McGee v. Connor*, 1 Utah, 92.

Vermont.—Indorsement on the back of a note, prior to its delivery to the payee, by one not a party thereto, renders him liable prima facie as a joint promisor or maker: *Nash v. Skinner*, 12 Vt. 219, 36 Am. Dec. 338; *Strong v. Riker*, 16 Vt. 554; *Sanford v. Norton*, 17 Vt. 285. But the actual contract made at the time of signing may always be shown by evidence other than the declarations of the indorser: *Strong v. Riker*, 16 Vt. 554.

Washington.—A person, other than the payee, who writes his name on a note after its execution and before delivery, is prima facie liable thereon as a joint maker: *Donohoe-Kelly Banking Co. v. Puget Sound Sav. Bank*, 13 Wash. 407, 52 Am. St. Rep. 57; *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492.

West Virginia.—A third person who indorses a note at the time it is made is prima facie liable as a guarantor or maker as the payee may elect, but he may show that his intention was to bind himself only as guarantor, or as second indorser, and thus limit his liability: *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571.

Guarantor.—In a number of the states, a third person, who signs his name on the back of a note before its delivery to the payee, is regarded as a guarantor and not an original promisor. In the following states this rule prevails.

California.—One not a party to a note, who puts his name on the back thereof at the time when the note is made or before its delivery to the payee, becomes a guarantor of its payment and not a promisor, and is entitled to legal notice of the nonpayment of the note before he can be charged on his contract: *Pierce v. Kennedy*, 5 Cal. 138; *Reeves v. Howe*, 16 Cal. 152; *Rogers v. Schulenburg*, 111 Cal. 281.

Connecticut.—A person, not a party to a note, who signs his name in blank on the back thereof at the time the note is made is a

guarantor and entitled to notice of nonpayment: *Bradly v. Phelps*, 2 Root, 325.

Illinois.—The indorsement of a note in blank by a third party before its delivery to the payee raises the presumption that it is intended thereby to assume the liability of a guarantor and not that of an original promisor or of an indorser. Such presumption may be rebutted by clear and convincing proof of a different, and the real, agreement between the parties: *Camden v. McKoy*, 3 Scam. 437, 38 Am. Dec. 91; *Carroll v. Weld*, 13 Ill. 682, 56 Am. Dec. 481; *Klein v. Currier*, 14 Ill. 237; *Blatchford v. Milliken*, 35 Ill. 434; *White v. Weaver*, 41 Ill. 409; *Lincoln v. Hinzey*, 51 Ill. 435; *Boyn-ton v. Pierce*, 79 Ill. 145; *Hamilton v. Johnston*, 82 Ill. 39; *Stowell v. Raymond*, 83 Ill. 120; *Eberhart v. Page*, 89 Ill. 550; *Kankakee Coal Co. v. Crane*, 138 Ill. 207; *Kingsland v. Koepp*, 35 Ill. App. 81; *Varley v. Title Guarantee etc. Co.*, 60 Ill. App. 565.

Iowa.—A blank indorsement on a note made before delivery, and by a person not the payee or an indorser, imports a sufficient consideration to sustain his contract of guaranty: *Veach v. Thompson*, 15 Iowa, 380.

Kansas.—A stranger to a note, who writes his name across the back thereof before it is delivered to the payee, incurs, prima facie, the liability of a guarantor, but parol evidence may be received to show the exact liability of such indorser, by showing the agreement of the parties at the time of the indorsement: *Fullerton v. Hill*, 48 Kan. 558; *Fuller v. Scott*, 8 Kan. 25; *Sarbach v. Jones*, 20 Kan. 497.

Kentucky.—If the name of a person, not the payee or assignee of a note, is written across its back in blank above the name of the payee, the legal presumption is that he signed first and before delivery to the payee, and that he is liable as a guarantor: *Arnold v. Bryant*, 8 Bush, 668.

Nevada.—An indorser of a note before delivery to the payee is prima facie a guarantor, entitled to demand and notice of nonpayment. This, however, is excused by the insolvency of the maker at the time the note becomes due: *Van Doren v. Tjader*, 1 Nev. 380, 90 Am. Dec. 498.

West Virginia.—If a note is indorsed by a third person before delivery to the payee, such indorser is held as an original promisor, guarantor, or indorser according to the nature of the transaction and the understanding of the parties at the time. This may be shown by parol proof. The payee may elect to sue such indorser as a guarantor of the note: *Roanoke Grocery etc. Co. v. Watkins*, 41 W. Va. 787.

Liability as Indorser.—In some of the states, the doctrine is maintained that, if a person, not a party to a note, places his name in blank on the back thereof before delivery to the payee, he is to be regarded simply as an indorser, and demand and notice are necessary in order to fix his liability. This rule is in force in the following states:

Alabama.—One who writes his name in blank on the back of a negotiable note before it has been indorsed by the payee is bound only as an indorser: *Hooks v. Anderson*, 58 Ala. 238, 29 Am. Rep. 745; *Milton v. De Yampert*, 3 Ala. 648.

California.—If a person, not a party to a note, places his name in blank on the back thereof before delivery, he is liable as an indorser, and entitled to demand and notice: *Jones v. Goodwin*, 39 Cal. 493, 2 Am. Rep. 473; *Fisk v. Miller*, 63 Cal. 367. Other California cases, as we have shown, hold such an indorser liable as a guarantor: See *Rogers v. Schulenburg*, 111 Cal. 281.

Indiana.—If a person other than the payee indorses a note in blank at the time of its execution, he thereby, *prima facie*, assumes the liability of an indorser only, but it may be shown by parol evidence that his liability is that of a joint maker or guarantor: *Early v. Foster*, 7 Blackf. 35; *Snyder v. Oatman*, 16 Ind. 265; *Sill v. Leslie*, 16 Ind. 236; *Roberts v. Masters*, 40 Ind. 461; *Nurre v. Chittenden*, 56 Ind. 463; *Browning v. Merritt*, 61 Ind. 425; *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. Rep. 101; *Pool v. Anderson*, 116 Ind. 88. Such an indorser is discharged from liability if not duly notified of the dishonor of the note: *Bronsen v. Alexander*, 48 Ind. 244; *De Pauw v. Bank of Salem*, 126 Ind. 553; such indorser designating himself as surety when signing is liable as such and not as an indorser: *Phillips v. Cox*, 61 Ind. 345. Although such an indorser is *prima facie* liable as an indorser only, his actual relation to the maker and payee, as between themselves, may be shown by parol evidence, but not so as to affect the rights of the holder of the note: *Houston v. Bruner*, 39 Ind. 376.

New York.—One who puts his name on the back of a note before delivery, being a stranger thereto, is a mere indorser and not a joint maker or guarantor, and is entitled to proper demand and notice: *Hall v. Newcomb*, 7 Hill, 416, 42 Am. Dec. 82; *Meyer v. Hilscher*, 47 N. Y. 265; *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 483; *Wylie v. Cotter*, 170 Mass. 356, 64 Am. St. Rep. 305; *Haviland v. Haviland*, 14 Hun, 627; *Waterbury v. Sinclair*, 28 Barb. 455. Parol evidence is inadmissible to vary the legal effect of such indorsement, so as to charge the indorser as joint maker or guarantor by showing that he indorsed before delivery to the payee for the maker's accommodation: *Hall v. Newcomb*, 7 Hill, 416, 42 Am. Dec. 82.

Oregon.—If a party places his name in blank on the back of negotiable paper before delivery to the payee, he does not thereby become liable as maker or guarantor, but as an indorser, and is entitled to due demand and notice. It makes no difference that he adds the word "security" to his indorsement: *Kamm v. Holland*, 2 Or. 59.

Wisconsin.—A third person who indorses a note in blank before its delivery to the payee is liable thereon as an indorser, and not as a comaker or guarantor: *Heath v. Van Cott*, 9 Wis. 516; *Davis v. Barron*, 18 Wis. 227; *King v. Ritchie*, 18 Wis. 554.

In some jurisdictions, especially New York, Oregon, Pennsylvania and Tennessee, it has been held that one who indorses a note before the payee, and before delivery to him, is, *prima facie*, a second indorser only, and, if he is duly charged at the maturity of the note, he cannot be made liable by a subsequent indorsement and waiver of protest and notice by the payee and first indorser: *Bacon v. Burnham*, 37 N. Y. 614; *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 433; *Barto v. Schmeck*, 28 Pa. St. 447, 70 Am. Dec. 145; *Schafer v. Farmers' etc. Bank*, 59 Pa. St. 144, 98 Am. Dec. 323; *Eilbert v. Finkbeiner*, 68 Pa. St. 243, 8 Am. Rep. 176; *Smith v. Kessler*, 44 Pa. St. 142; *Temple v. Baker*, 125 Pa. St. 634; 11 Am. St. Rep. 926; *Deering v. Creighton*, 19 Or. 118, 20 Am. St. Rep. 800; *Wade v. Creighton*, 25 Or. 455. This rule was once maintained in Tennessee: *Brinkley v. Boyd*, 9 Heisk. 149, but the later cases in that state firmly establish the doctrine that such an indorser is liable as an original promisor or joint maker of the note: *Bank v. Jefferson*, 92 Tenn. 537, 36 Am. St. Rep. 100; *Provident etc. Assur. Soc. v. Edmonds*, 95 Tenn. 53.

In New Jersey, the courts hold that the mere signature of a third person on the back of a negotiable note before its indorsement by the payee creates, *per se*, no implied or commercial contract whatever. The liability of such third person is that of a second indorser, guarantor, surety for the maker, or joint promisor, according to the intention with which he signed the note, and parol evidence is admissible to show what such intention was: *Orozer v. Chambers*, 20 N. J. L. 256; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256. An accommodation indorsement of a note after delivery, but before the payee, imposes only the liability of a second indorser, and does not authorize the holder to write over it a contract of guaranty: *Hayden v. Weldon*, 43 N. J. L. 128, 39 Am. Rep. 551. The signing of a non-negotiable note by a third person while in the hands of the maker does not, when passed to the payee, import any contract upon which suit may be brought: *Building etc. Soc. v. Leeds*, 50 N. J. L. 399.

Non-negotiable Paper.—As a general rule, the authorities maintain that one writing his name on the back of a non-negotiable note, to which he is not a party, before delivery to the payee, is to be treated as a maker of the note *prima facie*, and the burden of proof is on him to show a different intention of the parties and to change his liability to that of indorser or guarantor: *Lewis v. Harvey*, 18 Mo. 74, 59 Am. Dec. 288; *Paine v. Noelke*, 53 How. Pr. 273; *Paine v. Noelke*, 54 How. Pr. 333, 11 Jones & S. 176; *Barr v. Mitchell*, 7 Or. 347; *Houghton v. Ely*, 26 Wis. 181, 7 Am. Rep. 52; *Wells v. Jackson*, 6 Blackf. 41; *Pool v. Anderson*, 116 Ind. 88; *Cromwell v. Hewitt*, 40 N. Y. 491, 100 Am. Dec. 527; *Long v. Campbell*, 37 W. Va. 665.

On the other hand, some of the cases hold that such an indorser of non-negotiable paper is a guarantor and not a joint maker nor indorser, and is *prima facie* liable on the note upon the default of the principal without previous demand or notice. And

mere delay of the holder to proceed against the principal is not available to such guarantor as a defense: *First Nat. Bank v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94; *Leech v. Hill*, 4 Watts, 448; *Parker v. Riddle*, 11 Ohio, 103.

Notes Payable to Maker.—One who indorses a note made payable to the maker or his order before indorsement by the latter cannot be charged as a joint maker, and can only be held as an indorser entitled to demand and notice: *First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520; *Central Nat. Bank v. Dreydoppel*, 134 Pa. St. 499, 19 Am. St. Rep. 713; *Bigelow v. Colton*, 13 Gray, 309, 74 Am. Dec. 633; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 334; *Hately v. Pike*, 162 Ill. 241, 53 Am. St. Rep. 304; *Blatchford v. Milliken*, 85 Ill. 438; *Heidenheimer v. Blumenkron*, 56 Tex. 308. Such contract of indorsement is not perfected until the indorsement of the drawer's name as payee: *First Nat. Bank v. Payne*, 111 Mo. 291, 33 Am. St. Rep. 520; *Central Nat. Bank v. Dreydoppel*, 134 Pa. St. 499, 19 Am. St. Rep. 713; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 335; *Blatchford v. Milliken*, 85 Ill. 434. Parol evidence is not admissible to vary the liability of such an indorser of this kind of paper: *Bigelow v. Colton*, 13 Gray, 309, 74 Am. Dec. 633; *Hately v. Pike*, 162 Ill. 241, 53 Am. St. Rep. 304. In Maine, such an indorser of such paper is held liable as an original promisor: *Stevens v. Parsons*, 80 Me. 351.

Consideration.—One who puts his name on the back of a note before it is delivered to the payee is an original promisor, and the original consideration for the note is the consideration for his undertaking. It is not necessary that he shall participate in or receive any part of the consideration: *Carroll v. Weld*, 13 Ill. 682, 56 Am. Dec. 481; *Robinson v. Bartlett*, 11 Minn. 410; *Spaulding v. Putnam*, 128 Mass. 363; *Good v. Martin*, 2 Colo. 218; affirmed, *Good v. Martin*, 95 U. S. 90; *Krachts v. Obst*, 14 Bush, 84; *Marr v. Johnson*, 9 Yerg. 1.

The Liability of a third person who signs a negotiable instrument on the back before its delivery to the payee does not attach until the note is negotiated: *Stubbs v. Colt*, 30 Fed. Rep. 417; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170.

BERGEN COUNTY TRACTION COMPANY v. DEMAREST.

[62 NEW JERSEY LAW, 755.]

RAILROAD COMPANIES — NEGLIGENCE PRESUMED FROM ACCIDENT.—Proof of an accident resulting in injury to a passenger, caused by the derailment of a street-car, is sufficient to charge the company with negligence, and to cast upon it the burden of proof to show that the injury was caused without its fault.

L. Abbett and J. B. Vredenburg, for the plaintiff in error.

J. P. Stockton, Jr., and W. Dixon, for the defendants in error.

755 GUMMERE, J. The proofs in this case disclose that on the eleventh day of May, 1897, Mrs. Demarest, who was one of the plaintiffs below, was a passenger upon an open trolley-car of the defendant company; that the car, upon reaching the foot **756** of a hill in the village of Leonia, at a point where there was a curve in the track, left the rails, and, after running about seventy-five feet, collided with a tree, thereby throwing Mrs. Demarest from her seat and inflicting upon her the injuries for which she now sues.

On the trial of the case, in the court below, the plaintiffs attempted to show that the car was running at a high rate of speed when it reached the curve, and that it jumped the track for that reason. The defendants now insist that the proofs offered by the plaintiffs will not justify an inference that the accident resulted from such a cause; that, because of this failure of proof, the trial judge should either have ordered a nonsuit or directed a verdict for the defendant, and that his refusal to do so was error.

If it had been necessary for the plaintiffs, in order to make out a prima facie case, to prove to the jury what it was that caused the accident, we should be inclined to hold that there was sufficient evidence in the case to make it a question for the jury whether the accident was not the result of excessive speed in the running of the car. But no such duty rested upon the plaintiffs. All that they were required to do was to show the existence of negligence, on the part of the defendant, which occasioned the injury. And this they did by proving that the car left the track.

Ordinarily, proof of the occurrence of an accident will not of itself support a conclusion of the defendant's carelessness; but this principle is not of universal application. Where the

accident is one which, in the ordinary course of events, would not have happened if proper care had been used by the defendant, *res ipsa loquitur*: *Bahr v. Lombard*, 53 N. J. L. 233; *Sheridan v. Foley*, 58 N. J. L. 230. In the ordinary operation of the defendant's railroad, its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built, and the cars so constructed, that, when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently proof of the derailment of a car, in ⁷⁵⁷ the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation.

Having proved the happening of an accident which raised an implication of negligence on the part of the defendant, it was not incumbent on the plaintiffs to go further and show what the particular act of negligence was.

It is contended by counsel for the defendant that the maxim referred to has no application to cases like the present, and *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258, is cited in support of his contention. The injury in that case was caused by the derailment of a car, and the headnote to the opinion is that "in an action against a railroad company for an injury received by a passenger, no presumption of negligence arises from the mere fact that an accident has happened." The text of the opinion supports the syllabus, and the case seems to be an authority in favor of the defendant's position. I say seems, because in later cases in the same court, arising out of similar accidents, it is referred to in support of the opposite doctrine: *Edgerton v. New York etc. R. R. Co.*, 39 N. Y. 227, 229; *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562, 568, 47 Am. Rep. 75.

Assuming the case to support the position of the defendant, its authority has been repudiated by the later cases referred to. In the *Edgerton* case, Mr. Justice Grover, speaking for the court, uses this language: "Experience teaches that when the track and machinery (*viz.*, the engine and cars) are in a safe condition for the transportation of passengers, and prudently operated, the trains will keep upon the track and run thereon with entire safety to those on board. Whenever a car or train leaves the track, it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves

that the defendant, whose duty it is to keep the tracks and machinery in the proper condition, and to operate it with the necessary prudence and care, has in some respect violated this duty."

⁷⁶⁸ In the Seybolt case, Chief Justice Ruger, delivering the opinion of the court, quotes the above extract from the Edgerton case, and adds: "While it is true as a general proposition that the burden of showing negligence on the part of the defendant occasioning an injury rests, in the first instance, upon the plaintiff, yet in an action of this character, when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus then rests upon the defendant to prove that the injury was caused without his fault."

The cases are frequent in which the maxim has been applied to derailment accidents, but the multiplication of authorities is unnecessary. A full collation of the decisions may be found in Patterson's Railway Accident Law, 274, note 7.

There was no error in the refusal to nonsuit or to direct a verdict for the defendant, and the judgment of the circuit court should be affirmed.

CARRIERS—NEGLIGENCE PRESUMED FROM ACCIDENT.—

It is presumed that one injured while being transported by a common carrier is injured in consequence of the latter's negligence. To escape liability, it must show that it has discharged the full measure of its legal duty, and is in no way to blame for the accident: *Lincoln Street Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 68 Am. St. Rep. 723. See the extended note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490.

ADDICKS v. CHRISTOPH.

[62 NEW JERSEY LAW, 726.]

MASTER AND SERVANT—DUTY TO MINOR EMPLOYEES.

It is the duty of an employer of an infant to explain to him fully the hazards and dangers connected with the business, and to instruct him how to avoid them.

MASTER AND SERVANT—RISKS ASSUMED BY MINOR EMPLOYEES.—Minor employees assume by their contract of employment only those ordinary risks of their service which are obvious to them or have been pointed out in a manner suited to their youth and inexperience.

MASTER AND SERVANT—DUTY TO INFANT EMPLOYEE—WHETHER PERFORMED, WHEN QUESTION FOR JURY.—If, under all the circumstances, the question whether the master has performed his duty in pointing out to an infant employee the

dangers and hazards of the employment and how to avoid them, in a manner suited to his youth and inexperience, is one about which opinions may reasonably differ, it is proper to submit such question to the jury for determination.

MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉES WORKING WITH DANGEROUS MACHINERY.—If young persons, without experience, are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazards of carelessness in their use, and if the employer neglects this duty, or gives improper instructions, he is liable for injury resulting from his neglect of duty.

MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉES. A master, in instructing young servants in their work and in warning them against dangers to which it exposes them, must put such warning in such plain language as to be sure that they understand and appreciate the danger, and a failure to perform this duty renders the master liable for damages for any injury to a minor employé resulting therefrom.

MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉES —DELEGATION OF DUTY.—The duty devolving upon a master to explain to a minor employé the hazards of the service, and to instruct him how to avoid them, cannot be delegated to a foreman, so as to exonerate the master from liability for failure to perform it, on the ground that such foreman was a fellow-servant with the injured minor employé.

C. D. Thompson, for the plaintiff in error.

Voorhees & Booraem, for the defendant in error.

⁷⁸⁷ **HENDRICKSON, J.** The matter alleged for error in this cause is the refusal of the trial judge at the Middlesex circuit to nonsuit the defendant in error, who was the plaintiff below, at the close of his case, and also for his refusal to direct a verdict for the defendants.

The suit was for damages to the plaintiff, suffered by his foot having been caught in a machine for pressing clay into sewer pipe and injured, so that amputation of part of the foot became necessary.

The accident occurred at defendants' terra cotta works at Perth Amboy. The suit was in tort, and the gist of the action was the alleged failure of duty, on the defendants' part, to properly warn the plaintiff, their employé, of the dangers of the service, and to instruct him how to avoid them in a way and manner suited to his condition in life. The plaintiff was foreign born, a youth under sixteen years of age, ignorant of our language and without experience, previous to his employment, in the operation of the machine.

The machine in question was a steam press erected in an upright position, with a piston from above, known as a plunger,

descending out of a steam chest into a cylinder twenty inches in diameter, forty inches deep, the top of which extended one foot and two inches above the floor, whereby the clay which was fed into the cylinder was pressed into the molds prepared for it in the room below. The clay balls were cylindrical in shape, about eight inches in diameter, and weighed from seventy-five to ninety pounds apiece, and it took seven or eight of these to fill the cylinder. The plunger fitted the cylinder closely, and was governed in its motions by an engineer on the floor below. About half a minute was allowed for the filling in the cylinder before the plunger descended, but no signal was provided as to when it would start. Its movements were quite rapid when the steam was on, but when shut off the plunger would descend slowly.

On the occasion of the accident it had descended slowly to a point about one foot above the cylinder, where its further ⁷⁸⁸ progress was arrested by the clay balls that had become clogged on the rim of the cylinder. It was while in the effort to push in the clogging clay that his foot went into the cylinder and was caught by the plunger before he could withdraw it.

That the act of the plaintiff in using his foot for the purpose stated was one that ordinarily would be regarded as obviously dangerous must be admitted. The learned trial judge stated in his charge to the jury, and justly I think, that if the plaintiff had been an adult at the time of the injury he must have assumed the risk, even though acting under the instructions of the master.

The general rule thus recognized is that when one enters a service he assumes the risks of all dangers obviously or naturally incident to such employment: *Essex Co. Electric Co. v. Kelly*, 57 N. J. L. 100; *Foley v. Jersey City Electric Light Co.*, 54 N. J. L. 411; *Johnson v. Devoe Snuff Co.*, 62 N. J. L. 417.

It is claimed, however, on the part of the plaintiff, that his present action should be sustained under an existing modification of this general rule, which holds that it is the duty of the employer of an infant to explain to him fully the hazards and dangers connected with the business, and to instruct him how to avoid them; that minor servants are held to assume by their contract of employment only those ordinary risks of their service which are obvious to them or have been pointed out in a manner suited to their youth and inexperience. This doctrine has been approved in this and other jurisdictions: *Smith v. Irwin*, 51 N.

J. L. 508, 14 Am. St. Rep. 699; 1 Shearman and Redfield on Negligence, 5th ed., 218; 13 Am. & Eng. Ency. of Law, 897.

The question then is, Did the master in this case perform his duty under the rule as thus stated, or rather, was the question of his fair compliance with the rule, under the circumstances, left in such doubt as to be at least debatable, and hence a proper one to be submitted to the jury?

There was evidence on the part of the plaintiff tending to prove that the defendants, by their foremen, undertook to instruct ⁷⁸⁹ the plaintiff as to the duties of his employment, but that they had failed to point out to him the dangers of this service or to instruct him how to avoid them.

The plaintiff testified on this subject to the effect that he could not understand our language, and that the foreman instructed him by signs; that when he first went to work on the press, the foreman showed him everything as to how the clay should be thrown in, and on the third day after he began work the foreman instructed him, by signs, that whenever the clay became clogged he should kick it in with his foot. Upon this point the evidence reads as follows: "Q. Did you understand the foreman's language? A. No. Q. Describe what he did when he told you to use your foot. A. He first put clay into the cylinder and it got stuck and he used his foot, and told me to do likewise." It was also in evidence that no tool or appliance was provided with which to press down the clogging clay.

The plaintiff had been employed in these works for several weeks as a messenger boy, carrying water to the men and the like, and had thereby seen incidentally the working of the machine, but he had not been employed in any service connected with it. Another circumstance was developed, which indicated that the ordinary danger of this use of the foot was enhanced at times by a condition that would not be so obvious to a young and inexperienced operator. Sometimes, as a result of the clogging, a bridge would form across the cylinder, leaving a vacant space below, and it seems reasonable to infer that this may have been the situation on the occasion of this accident. For it appears that when the plaintiff pressed his foot against the obstruction it went down suddenly and plaintiff's foot with it.

It seems to me that, under all the circumstances, the question of whether the defendants had performed their duty in pointing out to the plaintiff the dangers and hazards of the employment, and how to avoid them, in a manner suited to his youth and inexperience, was one about which opinions might reasonably differ, and hence was a proper one to go to the jury.

⁷⁹⁰ There is another feature of this case, as it seems to me, that also justifies the trial court in its refusal to nonsuit, and that is the existence of evidence that defendants gave direction to plaintiff to use his foot for the purpose stated.

This direction, if made, involved an exposure to danger which might have been so obvious to an employé of mature years as to have defeated his remedy for damages, in case of injury therefrom, but when given to a servant so young and with so little experience as was the plaintiff, then I think, to say the least, that a fairly debatable question arises, whether, in view of this direction, he was not entitled to cautions and instructions as to the particular danger and as to how to avoid it.

This direction may also be regarded, I think, in the light of an instruction to the plaintiff, and, as such, a question arises whether it was a proper or an improper instruction to be given to the youthful plaintiff under the circumstances.

For if, in such case, improper instructions are given, and as a result the servant sustains injury, the master is liable. It was so held in *Tagg v. McGeorge*, 155 Pa. St. 368, 35 Am. St. Rep. 889, the language of the court being that when young persons without experience are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazards of carelessness in their use. If the employer neglects this duty, or if he gives improper instructions, he is responsible for the injury resulting from his neglect of duty.

It is proper to say here that the defendants, as a part of their case, admitted that the defendants had given the plaintiff instructions with regard to the matter of using his foot in pressing down the clogging clay, but gave testimony to the effect that plaintiff was instructed by signs not to use his foot for the purpose stated and warned to keep his feet and hands from under the plunger. This, of course, came too late to have any effect upon the motion to nonsuit, and it could have little or no weight upon the motion to direct a verdict, for the reason that it was quite clear that plaintiff was ignorant ⁷⁹¹ of our language and that the instructions and warnings, if any, were made by signs only, and in view of the contradictory evidence it became a proper question for the jury as to what the instructions and warnings really were and whether they were imparted in a manner that the plaintiff could be reasonably expected to have understood them correctly.

For the rule is that where the master is required to instruct

young servants in their work and warn them against dangers to which it exposes them, he must put this warning in such plain language as to be sure that they understand and appreciate the danger: 1 Shearman and Redfield on Negligence, 5th ed., 219. I think, therefore, that the motion to nonsuit was properly refused.

The contention that the evidence fails to show that the person who gave the alleged instruction to plaintiff was the foreman of the defendants cannot be sustained. While the plaintiff's evidence was somewhat inconsistent on this point, yet, allowing for the fact that the witness was testifying through an interpreter, I think the fair inference from the testimony is that he rightly designated the foreman as the person who gave him the instruction but was unable to give his name. In this he was afterward corroborated by the foreman himself, who was called by the defendants.

It has been further urged that if the foreman did give such instructions, he was acting as fellow-servant, and hence his negligence could not bind the master, the case of *Maher v. Thropp*, 59 N. J. L. 186, being cited as authority.

The answer to that is, that in the case cited the master had supplied the workman with proper implements to work with, but by the direction of the foreman, who was also engaged in the common employment, he undertook to do his work with other tools, in consequence of which he received the injury complained of.

In this respect the case now before us is clearly distinguishable from the one cited. Here the master had failed to supply any tool or implement for the work that led to plaintiff's injury, and the question was, under the evidence, whether the ⁷⁹²latter was not acting at the time under instructions which the master was bound to give, in obedience to a duty which he could not delegate.

The refusal to direct a verdict at the close of the case is also sustained, because the only new element introduced by defendants' evidence was a conflict in the testimony, which was for the jury to settle.

The other exceptions assigned were not pressed at the argument, and finding no error in the record, I will vote to affirm.

MASTER AND SERVANT.—MINOR SERVANTS ASSUME THOSE ORDINARY RISKS of their service which are obvious to them, or which have been pointed out in a manner suited to their youth and inexperience: *Smith v. Irwin*, 51 N. J. L. 507, 14 Am. St. Rep. 699; *Norton v. Volzke*, 158 Ill. 402, 49 Am. St. Rep. 167.

MASTER AND SERVANT—DUTY TO MINOR EMPLOYEES.—Owners of dangerous machinery, employing an inexperienced minor about it, unacquainted with its nature or use, are bound to take care that he is instructed therein. If they neglect this, or give directions to use the machinery in a manner which must lead to danger of which he is not likely to be fully aware, they are liable for any injury done to him in the use of machinery in that manner: *Foley v. California etc. Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, and note; *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582. Instructions to inexperienced servants, in order to relieve the master from liability for injury to them, must be such as to enable them to comprehend the dangers of their situation, and appreciate the necessity of adopting prudent methods for their protection: *Taylor v. Wooten*, 1 Ind. App. 188, 50 Am. St. Rep. 200; *Chicago etc. Co. v. Reinneiger*, 140 Ill. 334, 33 Am. St. Rep. 249; *Tagg v. McGeorge*, 155 Pa. St. 368, 35 Am. St. Rep. 889.

MASTER AND SERVANT—DUTY TO MINOR EMPLOYEES—DELEGATION OF DUTY.—A master must give warning to a minor employé of the dangers incident to his employment, and he cannot relieve himself of this duty by showing that he delegated its performance to another servant who was at fault in performing it: *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582; *Norton v. Volske*, 158 Ill. 402, 49 Am. St. Rep. 167.

CASES
IN THE
SUPREME COURT
OF
OREGON.

STATE v. HULL.

[33 OREGON, 56.]

LARCENY—CONSENT OF OWNER.—To constitute the offense of larceny, there must be a taking of property without the consent of the owner. Therefore, the crime is not constituted where an agent of such owner, acting under the latter's instructions, aids and abets the suspected thieves in taking the property, the object of the scheme being to discover and entrap the guilty parties.

William Smith, for the appellants.

H. E. Courtney, district attorney, for the state.

BY BEAN, J. The defendants, Hull and Wheeler, were jointly indicted, but separately tried and convicted of the crime of larceny. Each appealed, and their respective appeals were heard and tried together in this court as one case, and will be so considered. The important question presented is, whether the trial court erred in refusing to direct an acquittal, on the ground that the property alleged to have been stolen was taken with the consent and co-operation and assistance of the owner, through an agent employed for that purpose.

The facts, as they appear from the record, are that on September 7, 1897, one Prescott was employed by Perkins and five or six other men residing in and about Baker City, whose stock was being stolen from the range and butchered for the market, "to look after their cattle interest, and to detect, if he could, anybody molesting their cattle, stealing them, butchering them, or doing them any damage." He was given full permission by his employers to butcher or use their stock in any way he might

see proper "for the purpose of detecting who was stealing the cattle." Prescott immediately entered upon his employment, keeping his employers fully advised of his progress, and on the 2d of October informed them that Hull, Wheeler, and himself were going out ^{ss} that afternoon to round up a bunch of cattle, and to drive them that night over into Union county. It was thereupon arranged between him and his employers that he should proceed according to his agreement with the defendants, and that Perkins and the other parties, together with the sheriff, would secrete themselves at a certain point on the road along which it was proposed to drive the cattle, for the purpose of arresting Hull and Wheeler. In pursuance of this understanding, Prescott, Hull, and Wheeler left Baker City about 4 o'clock in the afternoon, each going in a different direction, but meeting a few miles out of town, from whence they proceeded to a point called "Magpie corral," gathering up cattle as they went. After reaching the corral, Wheeler held the cattle already gathered, while Hull and Prescott went out in different directions on the range, to gather up others; and, after they had thus rounded up eighty-three head, they proceeded on their drive to Union county. Just before reaching the point where Perkins and the sheriff and his posse were secreted, Prescott rode ahead, to notify them, and, after ascertaining that everything was as planned, returned to his companions, advised them that the way was clear and directed them to proceed. He himself, however, fell behind, on the plea that his horse had given out.

When Hull and Wheeler reached a point in the road opposite where the sheriff and posse were in hiding, they were directed to halt, but, in place of doing so, began firing; and, after quite a fusillade between them and the sheriff's posse, they escaped, but were subsequently arrested, indicted, tried, and convicted of stealing a cow belonging to Perkins, which was in the band. Prescott testified that he noticed the cow described in the indictment at Magpie corral, and recognized her as the property of Perkins before the drive commenced. His attention ^{ss} was particularly drawn to her because she was crippled, and had a large lump on her side; and Wheeler suggested that she be cut out because of this blemish, but Hull said it was all right, as it would be dark, and she would not be noticed. On cross-examination he said: "We had the cow in the bunch when we first held the cattle there, about half a mile from the [Magpie] corral. When we drove the cattle, I knew that this particular cow was in there. Q. Did you intend to steal that cow? A. No. Q.

Why didn't you cut her out? A. Fred said to leave her in. Q. Did you know whose brand and earmark that was? A. Yes, sir. Q. If you knew she was Perkins' cow, if you had no intention of stealing her, why didn't you cut her out and let her go? A. I was employed to catch the other men. Q. Had Mr. Perkins employed you to do that? A. Gus Perkins did. Q. You knew it was to be put to that use, for that purpose, didn't you? A. Yes, it was. Q. How did you know it? A. Gus told me. Q. When did you obtain this information of these people? A. I think it was in September—the seventh day of September.” The witness, after further testifying, among other things, that, before starting out that day, he had a talk with Perkins, was asked: “Q. What did you tell him you were going to do? A. Round up a bunch of cattle, and drive them away. Q. Why did you tell him? A. Because I promised to. Q. What did he say when you told him that? A. He says, ‘All right, we’ll be out there.’ Q. He said it was all right for you to round them up? A. Yes, sir. Q. And that they would be out there? A. Yes, sir. Q. And this animal, for the larceny of which this defendant is being tried, you recognized as being the property of Mr. Perkins when about half or three-quarters of a mile from Magpie corral? I think you said you didn’t⁶⁰ cut that out because Mr. Perkins told you that you could use it for the purpose if you wished? A. Yes, sir.’

The manner in which Prescott obtained the confidence of Hull and Wheeler, and their connection with the alleged larceny, was further detailed by him as follows: “I gained their confidence through a man by the name of Chumley. . . . Chumley came to me, and made me a proposition to go into this butcher business. I told him I would see, and it went on for several days. We had several talks, and finally he came to me, and told me, he says, ‘Fred, Hull wants me to furnish him dressed beef.’ I says, ‘All right; what will he give us for it?’ and he told me. I says, ‘All right, we will do that; we will get a team.’ . . . He was to get a team. He said Fred Hull would furnish the team. I hadn’t said anything to Fred about this work. In fact, Mr. Chumley told me he had spoken to Fred about my going in with him, and Fred didn’t want to let me in. He said, ‘But I will tell you what I will do; I will get you a man to work for you.’ He said, ‘All right.’ So Chumley got me, and we got ready to go out, and the first trip something occurred; I don’t remember what it was. Some one came to me, and said Fred couldn’t take the beef that night. So we didn’t

go. And it went on for two days, and Chumley and me took our horses and made a ride out through the country here. Fred Hull had made him a proposition to buy some calves, that he could turn them over—to steal some calves for him to turn over. And we went out to see if we could locate some calves. . . . I had not spoken to Hull about the matter. . . . The day after we came back from this ride was the first time I spoke to Hull. . . . Our first conversation was like this: I went to Fred and I says, ‘Chumley didn’t get them cattle.’ Chumley had come and told me he had quit. I says, ‘That fellow’s ⁶¹ quit; what’s the matter with us going on with this business?’ He says, ‘All right, we will do that.’ He says, ‘What can you do?’ I says: ‘We can go out there and get these cattle, and we can handle them. We can get all we want of them.’ He says, ‘All right’; so my first attempt was to go out and get some cattle—three head. . . . The day before we started to drive the cattle, Hull made the proposition that if we got this hundred head of cattle, and drove them, and stole them, we would divide the money equally between him and Earl Wheeler and myself.” When asked if anything was said by Hull as to what particular cattle were to be gathered up, the witness answered: “He said his preference was Joe Geddes’, Steve Osborn’s and brand ‘16’ cattle, belonging to Mrs. Harrison”; but the witness testified that the cattle taken included a large number belonging to other parties, and especially to the persons by whom he was employed. Perkins was called by the state, and testified concerning the employment of Prescott and his duties; that he was given full authority by his employers to use or butcher any stock belonging to them if necessary to gain the confidence and secure the detection of the persons who were stealing the cattle; that he (witness) was advised on the morning of the 2d of October, by Prescott, of the drive intended to be made that evening, and assented thereto; that he arranged with Prescott to be in waiting with the sheriff and posse at the place agreed upon, for the purpose of arresting the defendants, Hull and Wheeler, and was there in pursuance of such arrangement.

Based upon these facts, the inquiry is whether the taking by the defendants of the property alleged to have been stolen was such a trespass as will support the charge made. To constitute the crime of larceny, as charged in the indictment, there must be a trespass, that is, a taking ⁶² of the property without the consent of the owner. It is therefore evident that the crime

is not committed when the taking is by the consent, however morally guilty the taker may be. This is elementary law. But the difficulty lies in determining when the taking is by the consent of the owner in cases where he lays a plan to entrap a suspected thief. Upon this subject Mr. Bishop says: "The cases of greatest difficulty are those in which one, suspecting crime in another, lays a plan to entrap him. Consequently, even if there is a consent, it is not within the knowledge of him who does the act. Here we see, from principles already discussed, that, supposing the consent really to exist, and the case be one in which, on general doctrines, the consent will take away the criminal quality of the act, there is no legal crime committed, though the doer of the act did not know of the existence of the circumstance which prevented the criminal quality from attaching. But exposing property, or neglecting to watch it, under expectation that a thief will take this property, or furnishing any other facilities or temptations to such or any other wrongdoer, is not a consent in law": 1 Bishop's Criminal Law, 5th ed., sec. 262. And in *Williams v. State*, 55 Ga. 395, Mr. Justice Bleckley, in his usual clear and lucid style, puts the law thus: "It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete; and, if the accused embrace it, he will still be criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner ~~as~~ directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent to whom he has intrusted the conduct of the transaction puts his own hand into the corpus delicti, and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owner and his agent, after making everything ready and easy, wait passively and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities: 2 Leach, 913; 2 East's Pleas of the Crown, c. 16, sec. 101, p. 666; *Regina v. Johnson*, 1 Car. & M. 218; *Dodge v. Brittain*, Meigs, 86; *Kemp v. State*, 11 Humph. 320; *State v. Covington*,

2 Bail. 569. It is difficult to see how a man may solicit another to commit a crime upon his property, and, when the act to which he was invited has been done, be heard to say that he did not consent to it." And again, in *Love v. People*, 160 Ill. 508, Mr. Justice Phillips says: "It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

Within the rule announced by these decisions, and which we take to be the settled law (*State v. Adams*, 115 N. C. 775; *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295; *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364, and note), ⁶⁴ it is clear the evidence in this case was insufficient to justify a conviction of the defendants of the crime charged in the indictment. It appears from the uncontradicted evidence that the animal which they are charged to have stolen was taken, not only by the consent and passive acquiescence of the owner, but by his express direction, and upon the advice and with the active co-operation and assistance of his agent. There was no trespass committed in the taking, and there was no taking without his consent. Prescott, who was acting by his authority and under his direction, with full power to use the animal as he might see proper, was not only present at the time of the taking, but actively assisted in planning the whole affair, and in the perpetration of the acts necessary to constitute the crime. He assisted in rounding up the cattle, and driving them out of the county, by the express consent and authority of the owner. The property having been thus taken with the owner's consent, and by the active assistance of his agent, it makes no difference legally, although it does morally, that the defendants did not know of such direction and consent, and that they supposed and believed they were stealing the property in fact. The case upon this point is no different in principle from what it would have been had the owner, instead of acting through Prescott, acted in person, and himself assisted the defendants in rounding up and taking the animal in question, the defendants not knowing him to be the owner, but believing him to be a thief and a confederate of theirs. In such case it would not be seriously con-

tended that the defendants were guilty of larceny in taking an animal belonging to their supposed confederate, and no more can such a contention be maintained on this record. It follows that, however morally guilty the defendants may have been, their conviction is not justified by the evidence, nor warranted by the law; and the ⁶⁵ judgment is therefore reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent with the opinion.

LARCENY—CONSENT OF OWNER.—The crime of larceny always includes the taking and conversion of property without the consent of the owner: *Steward v. People*, 173 Ill. 464, 64 Am. St. Rep. 133, and note. Larceny is not committed when property is taken with the consent of the owner, although such consent is given for the purpose of decoying and entrapping the party suspected, and the latter, when taking the property, did not know of the consent which prevented the criminal quality from attaching to the act: *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295, and note. See the extended note to *People v. Richards*, 2 Am. St. Rep. 387.

Effect of Consent to Crime by Persons Injured Thereby.*

Considerable legal hair-splitting has been indulged in by courts and text-writers in discussing this subject. It must be admitted at the outset that it is beyond the power of a private person to license the commission of a crime. As to those more serious crimes which are purely transgressions of the public right, it must follow that consent thereto of private persons directly injured thereby cannot, to any extent, purge such crimes of their character as public wrongs, nor render those who commit them less liable to punishment. The consent of a woman upon whom an abortion was performed constitutes no defense to a prosecution therefor: *Commonwealth v. Wood*, 77 Mass. 85; *Commonwealth v. Snow*, 116 Mass. 47. The common-law rule was different: *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248; *Commonwealth v. Parker*, 9 Met. 263, 43 Am. Dec. 396. Similarly, consent of the deceased is no defense to a prosecution for homicide: *Regina v. Alison*, 8 Car. & P. 418. In a prosecution for bribery, the fact that the prosecuting witness was the giver of the bribe in question cannot excuse defendant: *Newman v. People*, 23 Colo. 300; nor is the latter exculpated by proof that the bribe was instigated for the purpose of entrapping him: *People v. Liphardt*, 105 Mich. 80; *State v. Dudoussat*, 47 La. Ann. 977; *O'Brien v. State*, 6 Tex. App. 635. In *People v. Liphardt*, 105 Mich. 80, it is said: "We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality

*REFERENCE TO MONOGRAPHIC NOTES.

Consent or connivance of person injured by crime: 31 Am. Dec. 365-367.
Entry by owner's consent in burglary: 91 Am. Dec. 432, 433.

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of the act is shown to be absent by the fact of the inducement, that such proof justifies acquittal."

Decoy Letters and Violations of Postal Laws.—The use of decoy letters by the officers of the United States postoffice department is well known. Such use is adopted as an effective means of detecting those who make improper use of the mails, as well as to discover dishonest employes of the department. In the prosecutions which have followed detections by such means, the federal courts have adhered to the distinction drawn in many cases of a different character, and held that decoy letters must not be used as a solicitation to commit crime. The criminal design must originate in the mind of the party whose detection is planned, and not in the mind of the government agent. It must not come as a suggestion to one who, however capable of committing crime, has not conceived an intent to do so: *United States v. Adams*, 59 Fed. Rep. 674. The rule, as established by the weight of authority, is thus stated in *United States v. Grimm*, 50 Fed. Rep. 528, 530: "If a letter gives information where obscene books or pictures can be obtained, it is an offense to deposit such a letter in the mail with intent to give such information, and thereby to aid in the sale and distribution of such books and pictures, even though the party addressed happens to be an official in the service of the government. And, if such act is done voluntarily and intentionally—that is to say, if the nonmailable letter is deposited in the mail by the accused without solicitation on the part of the officer that the mail be used to convey such intelligence—the weight of judicial opinion seems to be that the act does not lose its criminal character, though the offense may have been committed in responding to an inquiry from a person in the government service which was made under an assumed name for the purpose of concealing his identity. . . . It cannot be regarded as a valid excuse for a crime that some one has afforded the accused a convenient opportunity to commit it, for the purpose of testing his honesty." To the same effect: *Grimm v. United States*, 156 U. S. 604; *Rosen v. United States*, 161 U. S. 29; *Andrews v. United States*, 162 U. S. 420; *Price v. United States*, 165 U. S. 311; *United States v. Moore*, 19 Fed. Rep. 89.

So a postoffice employe charged with stealing from the mails cannot defend that the stolen letter, package, or matter was placed in the mails by government agents, and intended as a decoy: *United States v. Dorsey*, 40 Fed. Rep. 752; *United States v. Cottingham*, 2 Blatchf. 470; *United States v. Foye*, 1 Curt. C. C. 364; *Goode v. United States*, 159 U. S. 663; *Montgomery v. United States*, 162 U. S. 410; *Walster v. United States*, 42 Fed. Rep. 891. It has been held that the decoy matter may be so put up as to apprise the suspected employe that it contains an article of value, and yet no defense be afforded such employe if, under such temptation, he abstracts the decoy from the mails: *United States v. Wight*, 38 Fed. Rep. 106. The use of decoys in this manner has not been accepted by the courts without demurrer, however, although the

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weight of authority is as we have stated. Thus, in *United States v. Jones*, 80 Fed. Rep. 513, Hughes, D. J., criticised the practice: "There is something repugnant in the idea of the government, by art and contrivance, entrapping one of its citizens into the commission of crime in order to subject him to criminal prosecution; and such prosecutions have been felt by the courts to be more or less objectionable in morals and policy. The use of decoy letters for the purpose of discovering who the mail robbers are is, in itself, probably necessary, and, if objectionable, is at least tolerable, on the ground of necessity. But to go further, and, after the citizen has been seduced by the government into robbing the mail, to prosecute him criminally for the act, is more or less offensive to public sentiment. I should have been disposed to follow the rulings of some circuit courts in discouraging these prosecutions, but I think the supreme court has decided unmistakably, not only that the use of decoy letters is necessary to the detection of certain offenses, but that criminal prosecutions based on decoys must be sustained."

Liquor Laws.—In a prosecution for violating Sunday liquor laws, it cannot be defended that the liquor was sold to a member of the police force, who was sent by the chief of police to ascertain if defendant was violating his bond by selling, it appearing that defendant was not specially induced to sell by anything said or done by the officer: *Tripp v. Flanigan*, 10 R. I. 128. A board of excise commissioners may hire witnesses and informers to ascertain whether a suspected person is violating the liquor laws, and the use of such witnesses and informers is no defense to a prosecution for any breach of the law thereby discovered: *Board of Commrs. v. Backus*, 29 How. Pr. 38. But in *People v. Murphy*, 93 Mich. 41, it is intimated that public officers should take no part in this method of detecting violations of liquor laws, while it is there held that one is not exonerated from liability for such a violation by the fact that the person to whom he sold liquor had been hired to make the purchase for the purpose of prosecuting the violator of the law.

Larceny.—The offense of larceny cannot be constituted where the taking is with the consent of the owner of the property: *Dodge v. Brittain*, Meigs, 84; *Zink v. People*, 77 N. Y. 114. 33 Am. Rep. 589. Therefore, one who seeks to entrap another in the commission of larceny must take care that in his efforts he may not overreach himself and consent to the taking of his property. He may not, through his agent, solicit a suspected party to come forward and commit the criminal act, and, when the act is committed, be heard to say that he did not consent to it: *Williams v. State*, 53 Ga. 891. As was said earlier herein, the criminal design must originate in the mind of the suspected person and not in the mind of the owner: *Kemp v. State*, 11 Humph. 320. Thus, where a cotton owner's agent, having information of an intended theft of cotton by the defendants, watched the cotton-house two nights without anyone coming, then filled two sacks with cotton, one of which

he left in the cotton-house, and the other he sent by an agent to the defendant to give it to him and tell him he could get more cotton, and the agent returned in a little while with defendant, who entered the cotton-house, took the other sack of cotton and carried it home, it was held that defendant was not guilty of larceny, because of the owner's connivance at the crime: *State v. Adams*, 115 N. C. 775. In announcing a similar conclusion in *Connor v. People*, 18 Colo. 373, 36 Am. St. Rep. 295, the court said: "We do not wish to be understood as intimating that the services of a detective cannot be legitimately employed in the discovery of the perpetrators of a crime that has been or is being committed, but we do say that when, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked rather than encouraged by the courts." The principal case is decided upon the same line of reasoning: *State v. Hull*, 33 Or. 56. ante, p. 694.

The owner of property does not consent to a larceny thereof where he merely furnishes opportunities to a supposed thief in order to entrap him: *Varner v. State*, 72 Ga. 745; nor where he obtains the aid of a detective who, for the purpose of detection, joins the defendant in a criminal act designed by the defendant and actually carried into effect: *Pigg v. State*, 43 Tex. 108. So long as the owner does not induce the original design, but merely provides for the detection of the suspected person after he has formed the design to commit the theft, he cannot be held to have consented to the taking: *Alexander v. State*, 12 Tex. 540; *People v. Hanselman*, 76 Cal. 460, 9 Am. St. Rep. 238. Being informed of the design to steal his property, he may direct his servant or agent to encourage the design, and afford facilities for the commission of the crime, and the facilities afforded under such circumstances will not affect the criminality of the theft: *State v. Duncan*, 8 Rob. (La.) 562. A larceny is not robbed of its criminal character by the fact that one of the confederates acted in the interests of the police and the intended victim: *Commonwealth v. Hollister*, 157 Pa. St. 13; nor by the fact that a police officer was detailed to watch the taking of the property: *Commonwealth v. Nott*, 135 Mass. 269.

Other Crimes.—One who commits all the elements of the offense of extortion cannot escape by showing that his victim was in fact acting as a decoy: *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741; for it is not morally or legally wrong for persons to combine to detect an offense: *O'Halloran v. State*, 31 Ga. 206. The crime of burglary is made up of several essential ingredients. That one may be convicted of burglary, the presence of all these elements must be shown. Many cases have arisen where persons, being apprised of designs to burglarize their premises, have laid plans to entrap suspected parties. The execution of such plans is thus dis-

cussed in *People v. McCord*, 76 Mich. 200, 205: "It may be true that a person does not lose the character of an injured party by merely waiting and watching for developments. Possibly—but we do not care to decide this—leaving temptation in the way without further inducement will not destroy the guilt in law of the person tempted, although it is a diabolical business, which, if not punishable, probably ought to be. But it would be a disgrace to the law if a person who had taken active measures to persuade another to enter his premises, and take his property, can treat the taking as a crime, or qualify any of the acts done by invitation as criminal." The supreme court of Illinois makes similar criticisms, in *Love v. People*, 100 Ill. 501, saying in part: "It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

These criticisms, however justified in the cases wherein they were made, are too broad and rigorous to be accepted by all courts. The right of persons to entrap individuals suspected of intending crimes is well settled. A person charged with burglary, who, with criminal intent, did all the acts essential to constitute the crime, cannot defend that one who was present with and apparently assisting him in the commission of the crime was in fact a detective employed to entrap the accused: *State v. Jansen*, 22 Kan. (498) 349; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 285; *State v. Hayes*, 105 Mo. 76, 24 Am. St. Rep. 360. Yet it must be kept in mind that these same cases make it imperative that an accused must himself, and, with criminal intent, commit all the acts essential to the crime of burglary. He can be held responsible for his own acts alone, and not for those of his associate acting in behalf of the owner of the burglarized premises. To like effect: *Williams v. State*, 55 Ga. 391. It must be shown that he committed a breaking: *People v. McCord*, 76 Mich. 200. Where the breaking and entry were made, not by the accused, but by one acting with him for the purpose of entrapping him, it was held that the accused was not guilty of burglary: *People v. Collins*, 53 Cal. 185. A similar conclusion was reached where a servant of the owner, acting with the accused and under the owner's direction, unlocked the door of the premises sought to be burglarized, and entered with the accused: *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 477, and extended note.

An entry by preconcerted agreement with an apprentice of the owner of the premises, which apprentice unlocked and opened the door, may constitute a constructive breaking, burglarious as to both parties: *State v. Rowe*, 98 N. C. 629. Where a person, having learned of plans to burglarize his premises, does not try to pre-

vent the burglary, but, instead, lays plans to entrap the burglar, the latter's liability to punishment is unchanged: *Thompson v. State*, 18 Ind. 386, 81 Am. Dec. 364, and extended note; *State v. Sneff*, 22 Neb. 481; *Robinson v. State*, 34 Tex. Crim. Rep. 71, 63 Am. St. Rep. 701; *People v. Morton*, 4 Utah, 407. Such action by the owner was held, in the cases just cited, not to amount to a consent to the burglary. An entry with the owner's consent would scarcely be burglarious: *Turner v. State*, 24 Tex. App. 12; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126, and note. Contra, *Duncan v. Commonwealth*, 85 Ky. 614. In *Forsythe v. State*, 6 Ohio, 20, it was held that a married woman is incapable in law, by consent, to authorize a third person to break open and enter the house of her husband for an unlawful purpose. But it was held that where one joint occupant of a room, in the absence of the other, consented to an entry of a room by a third party for the purpose of robbing the absent joint occupant, the crime of burglary was not constituted; *Clarke v. Commonwealth*, 25 Gratt. 908. The crime of conspiracy to commit robbery is complete when the criminal agreement is entered into, and the guilt of the conspirators is not affected by the subsequent consent of the persons sought to be robbed, who, hearing of the contemplated crime, hire a detective to co-operate with the suspected parties for the purpose of entrapping them: *Johnson v. State*, 3 Tex. App. 590. Robbery must be against the will of the person robbed: *People v. Clough*, 59 Cal. 438. So one who whips another at the latter's request, and with no hostile motive, is not guilty of assault and battery: *State v. Beck*, 1 Hill (S. C.) 363, 26 Am. Dec. 190. An assault upon a consenting person is a legal impossibility: *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355.

LIEBE v. BATTMANN.

[32 OREGON, 241.]

GIFT.—TO CONSTITUTE THE DELIVERY necessary to the completion of a gift, there must be a parting with the dominion over the subject matter, with a present design that the title shall pass to the donee, and this so completely that, if the owner again resumes control over it, without the consent of the donee, he becomes liable as a trespasser, except after revocation of a gift causa mortis.

GIFTS—DELIVERY.—There is no difference between gifts causa mortis and those inter vivos as to the requirement of an intention in the donor to give, and a delivery to pass title, except that in the former case the passing of title is revocable by the recovery of the donor or his death from a cause other than that anticipated.

GIFT—IMPERFECT DELIVERY.—Where a man having committed suicide in his private room, a sealed and addressed envelope is found on his table, containing a promissory note in de-

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ceased's favor and generally indorsed by him, although the deceased undoubtedly intended to make a gift of the note to the addressee of the envelope, the intended gift must fail for imperfect delivery.

Condon & Condon and W. H. Wilson, for the appellant.

J. L. Story and Alfred S. Bennett, for the respondent.

²⁴³ WOLVERTON, J. This is a suit to foreclose a mortgage made to secure the payment of a promissory note calling for eleven hundred and seventy-five dollars, executed and delivered by the defendant Battmann to one R. G. Closter. The plaintiff claims title to the note and mortgage as the executor of the last will and testament of Closter, while the defendant Schutz asserts ownership based upon an alleged gift to him by Closter. This presents the only question in the case, and, if plaintiff is the owner, he is entitled to have the mortgage foreclosed, but, if not, the suit should be dismissed.

The facts upon which it is sought to establish the gift are, in substance, as follows: Closter and Schutz had been intimate friends for many years, and, on Friday, August 21, 1896, were living in a house which they had rented together, and where they ate at the same table. There was a large room in the building, opening out of ²⁴³ which was a bedroom on the east and another on the south. Closter occupied the east room, and Schutz the one on the south. Schutz, who had been out the night before, came home about 5 o'clock in the morning, and, after a brief but friendly conversation with Closter, retired to his room, and about 6 o'clock heard the report of a pistol shot coming from Closter's room, to which he hastened, and found that Closter had shot himself in the left side of the head, near the temple. A physician being called, Closter requested him "to make short work of it, that he wanted to die"; but shortly he passed into a comatose state, from which he never rallied, and died four days thereafter. On a small table at the head of his bed was found a couple of large envelopes, both sealed and addressed, one to Charles A. Schutz, Esq., and the other to Mrs. Bertha Vierea. Schutz handed these envelopes to the plaintiff, who kept them until the death of Closter, when the one addressed to Schutz was opened, and found to contain the said note for eleven hundred and seventy-five dollars, indorsed "R. G. Closter" in ink, and a note written in pencil upon a piece of another envelope in the following language, viz.: "Charlie, Dear Friend and Brother: Please see to, that Mrs. Bertha

Vieree get the letter addressed to her, and advise her how to manage. Yours, R. G. Closter." The envelope addressed to Mrs. Vierea was opened later, and was found to contain a note of Charles Stubling and wife to the deceased. Until the Monday preceding the tragedy, Closter had been living at the home of Mrs. Vierea, but, owing to some misunderstanding, he went to live with Schutz under the arrangement heretofore related. Liebe testified that it was a habit of Closter's to indorse all his notes, but Schutz testified that he saw the note in question about a week prior, and that it was not then indorsed; that some time previous to that Closter was much discouraged touching his ability to collect the ²⁴⁴ note, and said to witness, "I don't think I will get anything out of it," and "I might as well give it to you." Witness also testified that Closter inquired of him whether, if he indorsed a note, he would have to transfer the mortgage also, and he told him that he thought the mortgage followed the note. Witness further stated that the indorsement appeared to have been freshly made. A will of the deceased was found bearing date March 30, 1893, by which he disposed of all his property, part to Mrs. Vierea, and other portions of it to three of plaintiff's children, and nominated plaintiff as executor.

Is there in this testimony sufficient to establish a gift of the note and mortgage by Closter to Schutz? The transaction is not supported by any valuable consideration, nor does anybody pretend that it is; so that, if there is no gift, Schutz's title must fail. Nor can it make any material difference what may be the quality of the gift, whether *inter vivos* or *causa mortis*, as the essential elements which go to establish it in either case are the same, in so far as the pivotal facts give caste to the transaction. There must be an intention in the donor to give, and a delivery, to pass the title. If *causa mortis*, these things must have been done under the apprehension of death from some present disease or some impending peril, but it is revocable and becomes void by recovery, escape from such peril, or the death of the donee before the donor: *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758. We need only to consider the intention and the alleged delivery. That there was an intent to give we think is perfectly manifest from the evidence adduced. The inclosing of the indorsed promissory note in a sealed envelope, addressed to Schutz, together with the few lines written him touching the envelope addressed to Mrs. Vierea, indicates so strongly that such was the fact as to become insusceptible ²⁴⁵ of serious dis-

pute. It was held in *Caldwell v. Wilson*, 2 Spear, 75, that "delivery [in case of gift] is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party." This implies, as the facts of the case warrant, that the donor and donee shall also be mutually present. *Andrews, J., in Beaver v. Beaver*, 117 N. Y. 421-428, 15 Am. St. Rep. 531, says: "The delivery may be symbolical or actual; that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes, or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention." Many authorities concur in holding that a declaration of gift in writing, without a delivery of the chattel, is ineffectual to transfer title, because, not being founded upon a valuable consideration, the supposed contract is nudum pactum, and may be revoked at the will of the donor. And these, we are impressed, preponderate in weight of authority toward the establishment of the doctrine: See *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634; *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531; *In re Crawford*, 113 N. Y. 565; *Connor v. Tra- wick*, 37 Ala. 289, 79 Am. Dec. 58; *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707.

There must be a parting with the dominion over the subject matter of the pretended gift, with a present design that the title shall pass out of the donor and to the donee, and this so fully and completely, to all intents and purposes, that, if the donor again resumes control over it without the consent of the donee, he becomes a ²⁴⁶ trespasser, for which he incurs a liability over to the donee except after revocation of a gift *causa mortis*. And so essential is delivery as a factor in the transaction that it is said: "Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences": *Thornton on Gifts*, sec. 131. See, also, *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Wilcox v. Matteson*, 53 Wis. 23, 40 Am. Rep. 754; *Board of Supervisors v. Auditor General*, 68 Mich. 659-665; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819. The reason for the rule requiring delivery is obvious, and is founded upon "grounds of public policy and convenience, and to prevent

mistake and imposition": Noble v. Smith, 2 Johns. 52, 3 Am. Dec. 399.

Measured by the requirements of law, there was no delivery of the note to Schutz, nor does the fact that the note was indorsed dispense with its necessity. Such an indorsement, without consideration, could not have stronger force or operation than a parol gift or by writing not under seal. Whatever might have been Closter's intention in writing his name on the back of the note, he could revoke the gift before delivery simply by retaining the note, and Schutz could not assert title thereto until something else had been done to complete the transaction. It cannot be said that Closter ever parted with his dominion. If so, when did it occur? Assuredly not before he made the attempt upon his life, for Schutz was not present to receive it. Placing the note upon his table in the sealed envelope addressed to Schutz was not a relinquishment of possession, because it remained with him and under his complete and absolute control. He could ²⁴⁷ at any instant, while conscious and in his right mind, have bestowed it upon any other person, at his liking, and Schutz could not have prevented, nor would it have been an invasion of any rights acquired by reason of the indorsement and ensealment within the addressed envelope. And there could have been none after the shooting, for the note was not taken from the table nor mentioned by the deceased. The case can be no stronger than if the sealed envelope had been found among his other effects, for it was upon his table and within a room occupied solely by him. It was his intention, no doubt, that Schutz should find and appropriate it, but the right to make an appropriation did not accrue within the lifetime of Closter, and Schutz cannot now claim the property as against Closter's personal representative. The decree of the court below will therefore be reversed, and one here entered foreclosing the mortgage.

ON PETITION FOR REHEARING.

WOLVERTON, C. J. An elaborate and exhaustive petition for rehearing has been filed in this case, and we are constrained to review to some extent the salient points involved. Counsel say the gift was not consummated until the subject thereof reached the hands of Schutz, but that, having acquired possession of it prior to the death of Closter, it became his property at the instant of his taking possession. This view overlooks the fact that Closter was not then in a mental condition to bestow

anything. It was Closter's purpose, no doubt, to make the donation in contemplation ²⁴⁸ of death, not that he understood the distinction between a *donatio mortis causa* and a gift *inter vivos*, but such was the nature of the plan adopted, which he supposed would effect a change of ownership in the property. Death was absolutely necessary to render the gift in that form irrevocable upon his part, for it must be remembered that such a gift is always conditional until the event in contemplation of which it is made has actually come to pass. This, as we have shown in the main opinion, is the distinctive element which determines the nature of the gift. The object was to make the gift, but to retain the title while living. None other is manifest from his acts. This becomes apparent from the fact of his leaving the subject thereof on the table in his own room for the donee to discover and appropriate after he had put an end to his own existence. But the gift must fail as a gift *causa mortis* simply because there was no delivery. It is said that the donee discovered the property and appropriated it while Closter was yet living, but it was not his intention that the donee should thus or otherwise appropriate it while he lived, so that its possession prior to Closter's death was obtained contrary to his manifest intention. True, there was an ultimate intention to give, but none of executing the gift at that specific time, or that it should be consummated in the particular manner which it is claimed is sufficient to complete the transaction and pass the title. The ultimate intention is plain enough, but the manner adopted for the consummation of the gift was legally insufficient, as it contemplated no change in title, either conditionally or unconditionally prior to his decease. When Mr. Schutz possessed himself of the envelope and its contents he did that which the donor did not purpose should be done—for it was designed, as we have said, that he should have them only after his death, not before; so ²⁴⁹ that he took them without the donor's consent, and there could be no delivery in the absence of such consent. If the note indorsed and inclosed in the envelope, addressed as it was, had been handed by Closter to Schutz without saying anything, the act would have disclosed the purpose of the donor, and the gift would have been complete, as the delivery would have been accomplished. So, it may be admitted that if Closter had left the note upon a stump, on a by-way, to use the illustration of counsel, intending that Schutz should come along and discover and appropriate it, when he had possessed himself of it, if within the lifetime of Closter,

the delivery would have been completed and the gift consummated.

But suppose, in the first instance, Closter had subjoined a condition, when he handed the note to Schutz, that it should be and remain the property of the donor while living, and when dead it should pass to the donee; there would be no gift, because there would be no purpose of passing title within the lifetime of the donor. The transaction would partake of the nature of a testamentary disposition, but could not operate as a *donatio mortis causa*, or a gift *inter vivos*; as, in either case, the title must pass within the lifetime of the donor, although in the former it is subject to revocation: *Basket v. Hassell*, 107 U. S. 602. So, in the second instance, suppose it was intended, and in some way made clearly apparent, that Schutz should, subsequent to the death of the donor, and in that event only, have possessed himself of the property, and then appropriated it, could it be said that there had been a delivery, if he had come by and obtained it prior to Closter's demise? In such case, like the one at bar, there would have been no intention that the title should thus pass, and without the intention there could have been no delivery prior to his death. A mere passing of the naked possession does not ²⁵⁰ come up to the requirements of a good delivery. It must be a transfer of the property with a purpose on the part of the donor to relinquish his dominion over it, and thereby to part with and divest himself of the title. A case of some analogy and illustrative of the principle is *Miller v. Jeffress*, 4 Gratt. 472. There was a parol declaration by a party in his last illness of a gift of certain bonds which had been previously assigned to, and were then in the possession of, a certain firm of which the donee was a partner, but further than this there was no delivery of the subject of the intended gift. The court say, speaking through Baldwin, J.: "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring; or the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or, if the thing be in action, of the instrument by using which the chose is to be reduced into possession, as a bond, or a receipt, or the like. . . . It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*. The delivery stands in the place of nuncupation, and must accompany and form a part

of the gift. An after-acquired possession of the donee is nothing, and a previous continuing possession, though by the authority of the donor, is no better."

We quote again from Woods, J., in *Dickeschied v. Exchange Bank*, 28 W. Va. 340, who states the essentials to a valid gift *inter vivos* as well as those of a *donatio mortis causa*. He says: "Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. To constitute such a gift, the donor must be divested of, and the donee invested with, the right of property in the subject of the gift. It must be absolute, irrevocable,²⁵¹ without any reference to its taking effect at some future period. The donor must deliver the property, and part with all present and future dominion over it." Touching a gift *causa mortis*, he says: "There must be a delivery of the property to the donee, or to some other person for his use. The donor must part with all dominion over it, so that no further act of him, or of his personal representative, is necessary to vest the title perfectly in the donee; to belong to him presently, as his own property, in case the owner should die of his present illness, or from the impending peril, during the lifetime of the donee, and without making any change in relation to the gift": See, also, *Delmotte v. Taylor*, 1 Redf. 417; *Dunbar v. Dunbar*, 80 Me. 152, 6 Am. St. Rep. 166; *Bigelow v. Paton*, 4 Mich. 170; *Evans v. Lipscomb*, 31 Ga. 71; *Green v. Carlill*, 4 Ch. Div. 882. So that whether we look at the transaction in the light of authority, or examine it upon principle, it is not possible to sustain it as constituting a gift—a completed, consummated act—passing title to the donee.

The quotation from *Caldwell v. Wilson*, 2 Spears, 75, does not seem to be understood. Two methods of delivery are defined—one, by actual tradition from hand to hand; the other, by an expression of the donor's willingness that the donee should take when the chattel was present and in a situation to be taken by either party. In the latter there is involved no actual transfer of possession. The donor says, "There is the chattel (it being present); take it"; and the donee assents. This, the authority holds, would be equivalent to an actual manual transfer of possession from hand to hand. Hence we said the definition implied the mutual presence of the donor and donee. Of course, the assent or acceptance of the donee may be through an agent. But in this case,²⁵² there being no agent for either party, there could have been no delivery until Schutz took manual possession, and it is the delivery accomplished by actual

tradition from hand to hand that the counsel is contending for. The vice of the argument, however, lies in supposing that title passed at the instant the donee came into possession of the note and mortgage, it being before the donor had ceased to breathe, notwithstanding the fact that he was then irrational, and made no mention, either directly or indirectly, touching the property, or of its further disposal by him. It was the purpose of Closter to take his life instantly. If he had thus accomplished his purpose, it is admitted there would have been no delivery by reason of the donee's subsequently finding and appropriating the property. Although he lived some four days, he never manifested any other or further intention respecting it; so that we are relegated to the primary manifestation of his ultimate intention, and it leaves no new or additional act by which to signalize the transaction as a gift in any respect. The petition will be denied.

GIFTS—DELIVERY.—Delivery of property with intent to give is absolutely necessary to the validity of a gift: *Wagoner's Estate*, 174 Pa. St. 558, 52 Am. St. Rep. 828. A gift in view of death, equally with a gift between the living, requires for validity that either the thing to be given, or some sufficient means of reducing it to possession, should be delivered to the donee: *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352. To constitute a gift *inter vivos*, the donor must part with all present and future dominion over it: *Williamson v. Johnson*, 62 Vt. 378, 22 Am. St. Rep. 117. So, in gifts *causa mortis*, the donor must part with all present control and dominion over the subject of the gift: *Note to Appeal of Walsh*, 9 Am. St. Rep. 88. See the extended notes to *Pope v. Burlington Sav. Bank*, 48 Am. Rep. 787; *Stephenson v. King*, 50 Am. Rep. 179, on what delivery is sufficient to sustain a gift *causa mortis*.

PORTLAND v. BITUMINOUS PAVING COMPANY.

[83 OREGON, 307.]

PUBLIC CONTRACTS — INTERPRETATION — STREET IMPROVEMENTS.—Where a municipal ordinance governing the letting of contracts for street improvements requires the contractor to give, in the first place, a bond in a sum equal to the contract price conditioned upon his completing the improvement proposed according to the specifications, and, in the next place, a bond in a sum equal to twenty-five per cent of the contract price, conditioned that the contractor shall, for five years after the completion of the improvement, keep the pavement in repair of defects arising from defective materials or workmanship, the evident intent of the ordinance is to make the two bonds serve separate and distinct purposes, and a bond conditioned according to the second requirement of the ordinance cannot stand as security for the faithful perform-

ance of the principal contract, but must stand solely as security for the performance of the contract to repair.

MUNICIPAL CORPORATIONS—FUTURE REPAIRS OF STREET.—A city having power to repair its streets, when deemed expedient, and to assess the cost against abutting property, is empowered only to make provision for repairs demanded by present exigencies, and it is ultra vires for it to contract for keeping in repair streets or highways, made or to be made, as to levy the estimated cost of anticipated future repairs against the property of individuals.

MUNICIPAL CORPORATIONS—EXACTING CONTRACT FOR FUTURE REPAIR OF STREETS.—Where a city has power to contract for street repairs demanded by present exigencies only, and to assess the cost thereof against abutting property, it has no power to incorporate in a street paving contract a condition that the contractor shall keep up repairs for a period of five years, because the effect of such a condition is to increase the total contract price and to impose upon abutting property owners an added burden on account of anticipated repairs.

MUNICIPAL CORPORATIONS—STREET ASSESSMENT—VALIDITY.—An assessment to meet the expense of street repairs illegally contracted for by a city council is void.

CONTRACTS—FAILURE TO FOLLOW STATUTE—GOOD AS COMMON-LAW OBLIGATIONS.—Bonds or undertakings intended to be given in compliance with statutes, although having failed in substantial compliance therewith, will, if entered into voluntarily by competent parties, for a lawful purpose, and founded upon a sufficient consideration, constitute valid contracts at common law.

ESTOPPEL—PLEADING IRREGULARITY OF BOND.—Where an obligor has obtained and availed himself of the benefits to be derived from the execution of a bond, neither he nor his sureties can defeat their liability because of some irregularity in the proceeding in which the bond originated. They are estopped to set up such a defense.

MUNICIPAL CORPORATIONS—DOCTRINE OF ULTRA VIRES.—Neither the doctrine of estoppel, of ratification, nor of bona fide holding can be successfully invoked to enforce against a municipal corporation its ultra vires contract, but where the infirmity of its contract is, not that it is ultra vires, but that it is technically irregular, or that there has been a nonobservance of some collateral and nonjurisdictional formality, a contrary rule will obtain where demanded by equity, and such contract be held to bind the municipality.

MUNICIPAL CORPORATIONS — ULTRA VIRES CONTRACT—ACTION UPON.—Although an ultra vires contract of a municipal corporation has been fully executed on the part of the city, yet it cannot, by reason of the invalidity of the contract, recover damages for a breach thereof. The other contracting party is not estopped to set up the invalidity of the contract in defense of an action thereon.

Action by the city of Portland against the Bituminous Paving and Contract Company and its guarantors, upon a bond, given by the defendant in certain street paving transactions, and conditioned upon defendant's keeping the newly laid pavement in repair for five years.

Julius C. Moreland and R. & E. B. Williams, for the appellants.

William M. Cake, city attorney, and Fred L. Keenan, for the respondent.

³¹² WOLVERTON, J. It is important at the outset to ascertain and determine the proper interpretation to be given the language of the condition of the bond relating to repairs. The respondent contends that the condition is effective only as a guaranty that the work and materials will be done and furnished according to the stipulations of the contract, and hence that the bond stands as security for the faithful performance thereof. The language of the ordinance and the condition are very nearly identical, so that the consideration of the purpose of the former must necessarily aid us in arriving at the true construction of the latter. By the ordinance the contractor is required, in the first place, to give a good and sufficient bond, in amount equal to the contract price, conditioned, among other things, that he will commence and complete the proposed improvement according to the specifications. In addition to this, another bond, in a sum equal to twenty-five per cent of the contract price, is required to be given, conditioned as is the one in suit. Now, the evident purpose of the common council in requiring the larger bond was to secure a faithful performance of the contract in all its details, as by its terms it is equivalent to a requirement that the improvement shall be completed according to specifications, and this, we assume, comprehends the quality of the materials stipulated for, as well as the manner of the workmanship. So there would appear to be no need of the lesser one, except to subserve some other purpose; and it is not reasonable to suppose that the two bonds were intended to afford to the city cumulative remedies for the accomplishment of one and the same end. The language and grammatical arrangement of the ordinance and condition are in harmony with this ³¹³ thought. The obligation is to repair injuries arising from several causes, among which are such as may arise from defective materials and workmanship.

A guaranty against injuries for a reasonable time after completion, which may be attributable to these specific causes, might be regarded as a suitable, and perhaps proper, test of substantial compliance on the part of the contractor, and therefore might be held to operate as a guaranty of faithful performance, for it is sometimes argued that, if the work is well done, it

would need no repairs within such time. Still it is not a felicitous way of stating the guaranty for sound and good work: *Covington v. Boyle*, 6 Bush, 204. However that may be, such could not be the purpose of the bond in suit, because the city took another looking to that end. The causes assigned are so broad and comprehensive in their scope as to include injuries arising from every substantial source, and, in effect, subjoins an independent condition, not covered by the contract. So that the undertaking is simply to keep and maintain the street and pavement in repair for a designated period of time, regardless of the quality of the material stipulated to be furnished or supplied, or the workmanship to be employed. Upon the other hand, it is urged that the bond is invalid, because it was given as a guaranty that the contractor shall make and keep up the repairs upon the street and pavement, the expenses for which the city has, without power or rightful authority, assessed against the adjoining property. The city is empowered by charter provisions to improve its streets and to assess the costs thereof against the adjacent property: *Charter of Portland*, secs. 94, 100. It may also repair any street, or part thereof, whenever it deems it expedient, and assess the cost against such property; but before doing the same it must be declared by ordinance whether the cost ³¹⁴ shall be so assessed or paid out of the general fund. When it is declared that the proposed repair shall be made at the cost of adjacent property, thereafter it is to be deemed an improvement, and shall be made accordingly: *Charter of Portland*, secs. 122, 123. So that we find here authority to make both improvements and repairs and to assess the expense thereof against adjacent property. The manner of procedure in either instance is somewhat different, but the power remains. The repair contemplated, however, is such as the council may deem expedient to be made; that is, the necessity therefor must exist by the consideration of that body. Like an improvement, the probable cost of making it must be ascertained and determined, and this forms the basis for the assessment. As it pertains both to the improvement and repair, the council is empowered to make provisions for present exigencies, and it may charge the expense thereof against the property supposed to be benefited. Beyond this it would appear that it is not authorized to act. We have not been referred to any provision in the charter authorizing it to make contracts for keeping or maintaining streets or highways, or any improvements thereon, made or to be made, in repair, or to levy the estimated

cost of anticipated future repairs against property of individuals. It is manifest that the letting of the contract upon condition that the contractor should bind himself to keep up repairs for a period of five years, due generally to traffic, disintegration, and decay, defective materials and workmanship, was calculated to increase the amount of the bid by the estimated cost of such repairs. At least, the condition imposed an additional burden, which would not be assumed or undertaken without compensation. And the contractor would very naturally be expected to demand a higher price, in consideration of the obligation to assume the additional burden. Thus, by exacting the ³¹⁵ bond, a burden was undeniably imposed upon the adjacent property beyond such as was authorized by the charter. Such, in effect, is the holding of the court in *Brown v. Jenks*, 98 Cal. 10, wherein the court say: "This act contains no grant of authority to the city council for keeping a street in repair. Section 2 authorizes the council to contract for different kinds of street work. In all cases the work authorized is such as is necessary to make and complete a street, or to repair existing defects. The bond is not only unauthorized by the words of the statute, but the requirement changes, and may increase, the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required." In *People v. Maher*, 56 Hun, 81, 9 N. Y. Supp, 94, it appears that by provision of the charter of the city of Albany, New York, the expenses for ordinary repairs of a certain avenue to be paved with Trinidad asphalt were to be borne by the city. But the city council, in its ordinance providing for the pavement, required the contractor to agree "to keep said pavement in repair for seven years from and after its acceptance by the city, without expense to said city or abutting property owners," which provision was inserted in the specifications under which bids were received for the work, and pursuant to which the contract was made. It was held, on the question of its validity, that the necessary effect of the contract was to charge upon property owners the ³¹⁶ cost of keeping the avenue in repair in viola-

tion of the charter regulations, and the contract was therefore adjudged to be illegal. To the same effect, see *Fehler v. Gosnell*, 99 Ky. 380; *McAllister v. Tacoma*, 9 Wash. 272; *Boyd v. Milwaukee*, 92 Wis. 456; *Verdin v. St. Louis* (Mo. Sup., June 24, 1894), 27 S. W. Rep. 447; *Verdin v. St. Louis*, 131 Mo. 26. *Schenectady v. Trustees*, 66 Hun, 179, 21 N. Y. Supp. 147, illustrates the distinction drawn by the authorities touching the effect of the condition. In that case the undertaking was to "do all the work required by such ordinance and this contract in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion." And it was held, distinguishing *People v. Maher*, 56 Hun, 81, that the clause referred to had reference solely to the substantial character of the work performed and materials used in the performance of the contract. A like distinction is observed in *Cole v. People*, 161 Ill. 16. But the bond in question is distinctively an independent undertaking to keep the street and pavement in repair, made so both by the ordinance and the language thereof, covering, in effect, all injuries liable to arise from whatsoever source. It is clear that under the authorities, based upon what we believe to be sound reasoning, the assessment against property to meet the additional expense of such repairs was unwarranted by the charter.

But it does not follow that, because the assessment is void in so far as it may provide for the especial fund which forms the consideration for the bond, the bond itself is invalid and illegal and not capable of being enforced, if authority is found elsewhere for the city to enter into such a contract with the paving company: ³¹⁷ *Portland Lumbering Co. v. East Portland*, 18 Or. 21. But there was an evident lack of statutory power for entering into a contract for keeping and maintaining the street and pavement in repair, and consequently a want of legal authority to use the public moneys for that purpose. Under the charter the council was required to provide for taking security by good and sufficient bonds for the faithful performance of any contract let under its authority: *City Charter 1891*, sec. 116. It was authorized to let contracts for the repair of streets where present necessities required, or which may have been deemed expedient by the common council, but not to expend the funds of the public or the property owners of the municipality, and let contracts for anticipated future repairs. And this is just what it has attempted to do.

Upon the other hand, it is strongly urged by plaintiff that

the bond can be enforced as a common-law obligation, and of this we will now inquire. It has been held by this court that bonds or undertakings intended to be given in compliance with statutes, although having failed in substantial compliance therewith, will, if entered into voluntarily, and founded upon a valid consideration, and they do not violate public policy or contravene any statute, be enforced as common-law obligations: *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 306. The rule is, perhaps, more tersely stated by the supreme court of the United States, that if a contract is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law: *United States v. Tingey*, 5 Pet. 115; *United States v. Linn*, 15 Pet. 290. That the bond in question was entered into voluntarily cannot be gainsaid, and the sufficiency of the consideration must also be conceded.

318 The question remains, Is the obligation void as against the sureties of the obligor? for it is they who are prosecuting this appeal. It is a general rule of law that, where the obligor has obtained and availed himself of the benefits to be derived from the execution of the bond, neither he nor his sureties can defeat their liability because of some irregularity in the proceeding in which the bond originated. Having obtained the benefit, they are estopped from setting up the irregularity: *Carlson v. Dixon*, 12 Or. 148; *Johnson v. Weatherwax*, 9 Kan. 75; *Nunn v. Goodlett*, 10 Ark. 89. So it has been held that an obligor will not be permitted to defeat his liability by showing want of jurisdiction in the court before whom the action was pending, or the unconstitutionality of the law by virtue of which the bond or obligation had its inception: *McDermott v. Isbell*, 4 Cal. 113; *State v. Stark*, 75 Mo. 566; *Daniels v. Tearney*, 102 U. S. 415. In the latter case an action was sustained upon a bond given under and by virtue of an ordinance of the state of Virginia, which was held by the national courts to be unconstitutional and invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. Mr. Justice Swayne, speaking for the unanimous court, says: "It is well settled, as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent

judicial tribunal in another suit. In such case the principle of estoppel operates with full force and conclusive effect." The following, among other, cases are cited in support of the doctrine: *Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 350; *Railroad ³¹⁹ Co. v. Stewart*, 39 Iowa, 267; *Van Hook v. Whitlock*, 26 Wend. 43, 37 Am. Dec. 246; *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143; *United States v. Hodson*, 10 Wall. 409.

But here another and a different principle is involved. A municipality with limited and circumscribed powers and authority is a party to the contract, and the validity thereof depends for its support upon the requisite power of the city to enter into and enforce it. It is a doctrine of all the authorities that, if a municipality acts wholly beyond the scope of its express or implied authority, it is not estopped to set up that fact to defeat any alleged claim or demand arising by virtue of such unauthorized acts, and it is said that neither the doctrine of estoppel, of ratification, nor of bona fide holding can be invoked to support such a transaction: *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442. "This doctrine," says Dillon, "grows out of the nature of such institutions, and rests upon reasonable and solid grounds": 1 Dillon on Municipal Corporations, sec. 457. It is essential to the welfare and protection of citizens and taxpayers who contribute to the revenues, and whose property is subject to the laws and ordinances of municipalities, that they should be held to the exercise of such powers only as have been delegated to them through legislative enactment. They possess no powers but such as are delegated, or may be necessary to their exercise, and thereby implied, and the courts have been solicitous that they exercise none that they do not possess. Their creation being by public statute, and for definite and legitimate objects, to which their funds are to be applied, contracts which have no connection with such purposes, or which, by natural intendment, will cause an illegal or wrongful application of their funds or the funds of their citizens with which they are intrusted by chartered powers, or an application to other or foreign ³²⁰ objects, are ultra vires, and void: 2 Dillon on Municipal Corporations, sec. 936. In *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, it is said: "The doctrine of ultra vires has, with good reason, been applied with greater strictness to municipal bodies than to private corporations; and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there

has been no authority for making such a contract. . . . A different rule of law would, in effect, vastly enlarge the power of public agents to bind a municipality by contracts, not only unauthorized, but prohibited, by law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent."

A distinction is recognized between acts of the municipality or governing body, which are not within the scope of their general powers, and such as may be open to the objection that they are lacking in some technical and formal regularity in their adoption, or that there has been a nonobservance of some collateral act or formality prescribed, not jurisdictional in its character. The former are clearly and always void, while the latter, if they lead to a perpetration of a fraud upon contracting parties acting upon the faith of laws and ordinances apparently regular and valid, will be held to bind the municipality upon the principle of having received and appropriated benefits derived on account of them, and it will be estopped to deny their validity: *Moore v. Mayor*, 73 N. Y. 245, 29 Am. Rep. 134. Thus, in *Hitchcock v. Galveston*, 96 U. S. 341, it was held that, where the municipality had the power to contract for the improvement of the sidewalks, but in making such a contract it agreed to pay by giving ³²¹ its bonds, which it had no authority to do, and, having received benefits at the expense of the other contracting party, it could not object that it was not empowered to make payment in the mode sought to be adopted, and that, while the city could not be held to a specific performance of its undertaking, yet that it was liable to pay the contractor under the contract. The principle is recognized, and pertinently discussed, by Mr. Justice Strahan in *Portland Lumbering Co. v. East Portland*, 18 Or. 21, wherein a technical defect in a notice required by the statutory procedure in levying a local assessment was urged as a defense. He says: "I do not think, under the charter, this technical defect in the notice destroyed or impaired the power of the city to contract. . . . The defendant's claim is not that the general power did not exist, but there was a slight departure from the authority conferred in the particular already pointed out, and for that reason the whole proceeding was ultra vires and void. Under the circumstances of the case, I am unable to accede to this argument."

It must be conceded that a municipality will be estopped to

enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it. If it has exceeded its general powers in attempting to enter into contractual relations with an individual, and if, because of its exercise of such excess of authority, the individual, who is charged with knowledge of its just powers, is left without remedy, there is no good or sufficient reason why the city should not, under like circumstances, be estopped to proceed against the individual. The contract is invalid by reason of the lack of power to enter into it, and, if invalid as to one of the contracting parties, it is also ³²² invalid as to the other. "So, on the other hand," says Mr. Dillon, "a party making with the city a contract which is ultra vires is not estopped, when sued thereon by the corporation for damages, to set up its want of authority to make it": 1 Dillon on Municipal Corporations, sec. 458. It is sometimes asserted that a contract made by a municipal corporation, where there exists a defect of power, or even a want of power to so contract, yet if not made in violation of charter regulations or any statute prohibiting, is not illegal; and, if such a contract has been executed, and benefits have been received and appropriated, the party receiving them is estopped to deny its validity: *St. Louis v. Davidson*, 103 Mo. 149, 22 Am. St. Rep. 764. *State Board of Agriculture v. Citizens' Street Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702, is to the same effect as applied to a private corporation. This doctrine has been criticised as too broad and unsound, and contrary to the great weight of authority: 1 Beach on Public Corporations, secs. 217, 218. But, however this may be, it is not thought to be entirely applicable to the case at bar.

It, as we have seen, was clearly beyond the express or implied powers granted to the city to contract for keeping and maintaining the street and pavement in repair against injuries that might arise from all causes for the period of five years. If it could contract for this length of time in the future, why not for a much longer or even an indefinite, time, and use the funds of the city or abutting property owners for payment in advance? It is undoubtedly a duty which is due to the public, and enjoined upon the city, to see that the streets are kept in reasonable repair. But the mode of making repairs is specifically pointed out and limited to present necessities, and thereby constitutes the measure of power; and, being the only manner designated, must be construed ³²³ as a prohibition of any other method. That is to say, the city is not only powerless to adopt

any other mode or method, or to expend the public moneys in its promotion, but it is prohibited from proceeding in any other manner. While the contract has been fully executed on the part of the city, yet it cannot, by reason of its invalidity, recover damages on account of a breach thereof. In further support of these views, see *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 144; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Nash v. St. Paul*, 8 Minn. 172 (143); *Covington Ry. Co. v. Mayor*, 85 Ga. 367; 1 *Beach on Public Corporations*, sec. 217; *Durango v. Pennington*, 8 Colo. 257.

We have come to this conclusion after much and careful deliberation, because of the importance of the matters involved, but we are satisfied that the rule touching the invalidity of the acts of a municipal corporation where entirely beyond the general scope of its powers is the only safe one, in view of the safeguards which should always be maintained against the unauthorized acts of the authorities and the illegal use of the funds of municipalities. The judgment must, therefore, be reversed, and the cause remanded, with directions to the court below to sustain the demurrer.

MUNICIPAL CORPORATIONS — FUTURE REPAIR OF STREETS.—Municipal authorities, when contracting for the paving of a street, may embody in the contract provisions by which the contractor guarantees the durability of the pavement for a stated period and to repave at a stated price all openings made in the street during such period, but such contract must not raise the price of paving to property owners assessed therefor beyond the fair cost of a good pavement, and they may show that the nominal price for paving under the contract includes extra compensation for the guaranty, and for repaving, and thus reduce the assessment to the cost of a proper pavement without the added stipulations: *Wilson v. Trenton*, 61 N. J. L. 599, 68 Am. St. Rep. 714.

MUNICIPAL CORPORATION CAN BIND TAXPAYERS only in the mode prescribed by law, and cannot substitute any other: *Violett v. Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825.

BONDS—FAILURE TO COMPLY WITH STATUTE—VALIDITY.—Bonds intended to be given in compliance with statutes, although not so given, if entered into voluntarily, and founded upon a valid consideration, and not in violation of public policy or contravening any statute, will be enforced by common-law remedies: *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 306.

MUNICIPAL CORPORATIONS — ESTOPPEL. — THE DOCTRINE OF ULTRA VIRES is applied with greater strictness to municipal bodies than to private corporations; and, in general, a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract: *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830. The doctrine of estoppel cannot be applied as against a city, to validate a contract which it has no power to make: *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515.

MUNICIPAL CORPORATIONS—ULTRA VIRES CONTRACT—SUIT UPON.—A party contracting with a city under a contract which is ultra vires, but not prohibited, is estopped, when sued upon the contract, from setting up the plea of ultra vires to escape liability and to enable him to retain benefits received under the contract: *St. Louis v. Davidson*, 102 Mo. 149, 22 Am. St. Rep. 764.

FARMERS' NATIONAL BANK v. GATES.

[33 OREGON, 333.]

MORTGAGE—FORECLOSURE—PARAMOUNT TITLE.—A suit to foreclose a mortgage is not an appropriate proceeding in which to litigate questions of adverse or paramount title.

MORTGAGE—ASSUMPTION BY MORTGAGOR'S GRANTEE.—One who, by the terms of his conveyance from a mortgagor of premises, agrees to pay a mortgage thereon as part of the purchase price, makes it his own as effectually as if he had executed it himself.

MORTGAGE—FORECLOSURE—LITIGATION OF ADVERSE RIGHTS OF MORTGAGEES.—Where a purchaser of upland bounded by a lake assumes a mortgage thereon as part of the purchase price, and later, having secured from the state a deed to the bed of such lake as swamp and overflowed land, mortgages the portion thereof immediately in front of the upland, in a suit to foreclose the first mortgage, the plaintiff has a right to have it litigated and determined whether there is any conflict between the two mortgages as to the land covered thereby.

J. D. Slater, for the appellant.

Fenton, Bronaugh & Muir, for the respondent.

³³³ **BEAN, J.** This is a suit to foreclose a mortgage, and the only question for our consideration is whether the court below erred in dismissing the suit as to the Western & Hawaiian Investment Company, Limited. The facts necessary to an understanding of the question, as they appear from the pleadings, are that in July, 1891, the defendant Vina Gates and her husband mortgaged to the plaintiff's assignor certain real property, including lots 1 and 2 in section 29, township 3 south, of range 39 east, and on April 27, 1892, conveyed the same to the defendant Nodine by a deed containing a stipulation wherein he assumed and agreed to pay the mortgage as part of the purchase price. As shown by the public surveys, the premises referred to are bounded on the south by Tule Lake, which the plaintiff claims and alleges to be a non-navigable body of water, but which, according to defendants' ³³⁰ allega-

tions, is swamp and overflowed land. At the time of Nodine's purchase from Mrs. Gates, he had, or soon thereafter obtained, a deed from the state for the bed of the lake as swamp land, and on July 14, 1893, mortgaged the portion thereof immediately in front of the premises described in plaintiff's complaint, and below the meander line, to the defendant corporation. The plaintiff thereafter began this suit to foreclose its mortgage; and assuming that, under the doctrine of riparian rights, its mortgage covers the land to the middle of the lake, made the defendant corporation a party, as a subsequent mortgagee. But the court below held that the question of title thus presented could not be tried in this suit, and dismissed the complaint as to the defendant corporation.

It is familiar doctrine that a suit to foreclose a mortgage is not an appropriate proceeding in which to litigate questions of adverse or paramount title: 2 Jones on Mortgages, 1445; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Banning v. Bradford, 21 Minn. 308, 18 Am. Rep. 398; Summers v. Bromley, 28 Mich. 125; and it is sought to invoke this principle in support of the rulings of the court below. But the question here presented is of an altogether different character. It is practically, as we view it, a controversy between mortgagees claiming under the same mortgagor, and not adversely to him. It is true plaintiff's mortgage was not executed by defendant Nodine; but, by the terms of the conveyance from Gates, he assumed and agreed to pay it as part of the purchase price, and thus made it his own as effectually as if he had executed it himself: Miles v. Miles, 6 Or. 267, 25 Am. Rep. 523; Walker v. Goldsmith, 7 Or. 161; Alvord v. Spring Valley Gold Co., 106 Cal. 547; Burbank v. Roots, 4 Colo. App. 197; Clark v. Fisk, 9 Utah, 97. So that ³⁹¹ the case stands substantially as if Nodine, being the owner of the upland bounded by Tule Lake, by purchase from Gates, and having a deed to the bed of the lake from the state, as swamp and overflowed land, had mortgaged the upland according to legal subdivisions to plaintiff, and subsequently the bed of the lake immediately in front thereof to the defendant. Under such circumstances, it seems to us the plaintiff would have a right, in a suit to foreclose its mortgage, to litigate and have tried and determined, as between it and the defendant, the question as to whether there was any conflict in the mortgages of the respective parties: Board of Supervisors etc. v. Mineral Point Ry. Co., 24 Wis. 121; Baass v. Chicago etc. Ry. Co., 39 Wis.

296; and such is practically the question here presented. The decree of the court will therefore be reversed, and the cause remanded, with direction to try out the questions in controversy between the parties.

MORTGAGES—FORECLOSURE—PARAMOUNT TITLE.—The principal case is in harmony with the great weight of American authority in holding that in an action to foreclose a mortgage questions of title, adverse or paramount, cannot be litigated: *Monographic note to Provident Loan Trust Co. v. Marks*, 68 Am. St. Rep. 354. The contrary doctrine is held in *Kansas: Provident Loan Trust Co. v. Marks*, 59 Kan. 230, 68 Am. St. Rep. 349.

MORTGAGE—ASSUMPTION BY MORTGAGOR'S GRANTEE. A grantee who covenants with the grantor to pay off a mortgage on the premises becomes in equity the principal debtor with respect to the mortgage debt. He is liable to the mortgagee therefor, though his grantor was not liable: *Note to Enos v. Sanger*, 65 Am. St. Rep. 40. See, also, *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431.

MORTGAGES — FORECLOSURE. — SUBSEQUENT MORTGAGEES or encumbrancers, claiming priority of liens, are proper defendants in a foreclosure suit for litigating that issue, because the only proper object of the proceeding is to bar all rights subsequent to the mortgage: *Monographic note to Provident Loan Trust Co. v. Marks*, 68 Am. St. Rep. 354.

HUNTINGTON v. CROUTER.

[38 OREGON, 408.]

EQUITY—JURISDICTION—ENJOINING EXECUTION OF VOID JUDGMENT.—A court of equity has plenary power, and ought to enjoin the enforcement of a judgment at law, based upon an officer's false return of service of process.

JUDGMENTS—VACATION BY EQUITY COURT.—A court of equity should not set aside a judgment at law for lack of service of process by the officer making the return of service, except upon clear, satisfactory, and convincing proof.

PROCESS—OFFICER'S RETURN AS EVIDENCE.—An officer's return of service of process is *prima facie* evidence of the material facts recited therein.

Suit to set aside a judgment and enjoin the levy of execution issued thereon. The judgment was rendered by default against complainant upon a return by the officer of proper service of process, which return the complainant alleges was false. Appeal from a decree in accordance with the prayer of the complainant.

John B. Messick and W. H. Packwood, Jr., for the appellants.

Huntington & Wilson and King & Saxton, for the respondents.

410 MOORE, C. J. It is contended by defendants' counsel that the sheriff's return upon the summons in question is conclusive upon the parties to the action; that plaintiff cannot controvert the facts recited therein; and that, if he has been injured thereby, his remedy is an action against the officer for a false return; while plaintiff's counsel maintain that the judgment rendered upon the false return, without notice to, appearance of, or defense by their client, is void; that the circumstances rendering it so are not apparent from an inspection of the record, and, such being the case, a court of law is powerless to arrest the execution of the judgment, in view of which a court of equity is competent, and should, upon proof of the falsity of the return, afford the relief prayed for. The question presented by this appeal is one which the courts have considered with much care, resulting in decisions that are wholly irreconcilable. It was early held by the common-law courts 411 that their judgments purported absolute verity, and were binding upon all parties thereto, in so far as the issue might have been litigated in the action, even though obtained by fraud; and this doctrine was carried to such an extent that, if the jurisdiction of the court depended upon the false return of an officer to the service of process, the party injured by the judgment could not be relieved therefrom, but, after satisfying the judgment, he was permitted to maintain an action against such officer to recover the damages he had sustained. The chancellor's court, however, inculcating the doctrine that a party ought not to be deprived of his property without notice and an opportunity to be heard, enjoined the enforcement of judgments at law which were obtained by fraud or concealment. "And this," says Blackstone (3 Blackstone's Commentaries, 437), "not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth, and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all."

Much complaint was made by those who were opposed to such equitable intervention, and at last, to settle the heated controversy, the matter was referred to the king (James I) who, having obtained the advice of his counsel, gave judgment in favor of the equitable jurisdiction: 3 Blackstone's Commen-

taries, 53; 1 Story's Equity Jurisprudence, sec. 51. This decision, rendered A. D. 1616, was not satisfactory to those admirers of the principles of the common law who opposed any interference with the judgments of its courts by a court of equity; and from that time to the present the doctrine has been and is to some extent maintained that the judgment of a court of general jurisdiction ought not to be set aside by a court of equity upon evidence aliunde the original ⁴¹² record. But the prevailing doctrine of modern decisions is that, when it appears a judgment has been rendered against a party upon the false return of an officer, it is the imperative duty of a court of equity to correct the wrong and arrest the judgment, and thus avoid a circuity of remedies by compelling the party to satisfy the judgment, and thereafter seek reparation by an action against the officer, who may be insolvent. The conflict in the decisions of the different courts upon this important subject being irreconcilable, and, as the question in this court is *res integra*, it becomes necessary to adopt that line which to us seems most compatible with reason, and consonant with the principles of equity.

In a note to the case of *Taylor v. Lewis*, 19 Am. Dec. 135, it is said: "The rule stated in the principal case, that a judgment cannot be impeached in equity as fraudulent and void when it appears that the officer, without combination with the plaintiff, has returned process as served on the defendant, when in fact the same never was served, can hardly be considered the prevailing rule at the present day. A few decisions are found affirming the same, but most of the modern authorities are opposed thereto." Further in the note the learned editor says: "It would seem to be one of those self-evident axiomatic propositions that might be safely asserted without fear of successful contradiction that no greater fraud can possibly be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in his defense. To do so is repugnant to our sense of natural justice, opposed to the underlying principles of all free governments, deriving their authority from a written constitution, and is seldom, if ever, sanctioned, except where might, and not right, prevails. Yet the authorities just quoted undoubtedly have that effect; for when it is asked, and that, too, of those marvels of wisdom, ⁴¹³ and guardian angels of the rights of person, courts of equity, to relieve against the commission of such an outrage (*fraud per se*, it might truthfully be said), and to prevent one man, through the medium

of courts of justice, from confiscating the property of another, their answer is, 'Inasmuch as you have a cause of action against the officer for making a false return, we will deny you the relief sought, allow the constitution to be violated, and your property confiscated.' Fortunately, however, the authorities quoted have not been followed in this country. A contrary rule prevails, and a judgment at law may be vacated or relieved against in equity when it is made to appear that it is unjust, and that the court in pronouncing it acted without jurisdiction."

As supporting the rule, the reason for which is so ably set forth in the foregoing note, see, also, 1 Black on Judgments, secs. 376, 377; 2 Freeman on Judgments, 4th ed., sec. 496; 1 High on Injunctions, 3d ed., secs. 222, 229; 1 Spelling on Extraordinary Relief, sec. 138 et seq.; 10 Am. & Eng. Ency. of Law, 907; Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666; Handley v. Jackson, 31 Or. 552, 65 Am. St. Rep. 839; Moore v. Town Council, 32 Fed. Rep. 498; Noyes v. Hillier, 65 Mich. 636; Hamilton v. Rogers, 67 Mich. 135; Ogden v. Davidson, 81 Va. 757; Johnson v. Gregory, 4 Wash. 109, 31 Am. St. Rep. 907; Great West Min. Co. v. Woodmas Min. Co., 12 Colo. 46, 13 Am. St. Rep. 204; Owens v. Ranstead, 22 Ill. 161; Weaver v. Poyer, 79 Ill. 417; Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589. Many more decisions might be cited which support the doctrine that a court of equity has plenary power, and ought, to enjoin a judgment at law based upon the false return of an officer, but the foregoing will serve to illustrate the wisdom of the more modern rule, which demonstrates that the action at ⁴¹⁴ law against the officer is too circuitous, and often inadequate; and, such being the case, the court committed no error in permitting evidence to be introduced at the trial which tended to prove that plaintiff had not been served with the summons in the original action.

A court of equity should not set aside a judgment at law except upon clear, satisfactory, and convincing proof of a lack of service of process by the officer making the return of service, which must always be prima facie evidence of the material facts recited therein: Randall v. Collins, 58 Tex. 231; Starkweather v. Morgan, 15 Kan. 274; Jensen v. Crevier, 33 Minn. 372; Wyland v. Frost, 75 Iowa, 209; Connell v. Galligher, 36 Neb. 749. Without attempting to quote any of the testimony introduced at the trial, we think it sufficient to support the findings of the

court, and to satisfy the requirements of the foregoing rule; and hence the decree is affirmed.

EQUITY—RELIEF AGAINST JUDGMENTS.—The jurisdiction of equity, as directed against judicial proceedings, is personal in its character, and is confined to preventing the party in whose favor some judgment or other determination has been made from making an inequitable use thereof: Monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 218. The weight of authority is that though process had not been served on the defendant, and the court had not acquired jurisdiction of him, he will be left to his remedy at law, if he has any, and will be denied relief in equity unless he can show that, had he had an opportunity to make his defense, he would have wholly or in part established it, and that the judgment against him was therefore substantially unjust: Monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 223.

JUDGMENTS—RELIEF FROM IN EQUITY.—Where there is an official return of due service of process, the party seeking relief on the ground that it is false must not only assume the burden of proving such falsity, but must also produce very clear and satisfactory evidence of his contention: Monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 245.

PROCESS.—AN OFFICER'S RETURN is usually conclusive upon the same parties in the same action, and others in privity with them, but in other actions is prima facie evidence only: Stewart v. Duncan, 47 Minn. 285, 28 Am. St. Rep. 367, and note.

PERHAM v. PORTLAND ELECTRIC COMPANY.

[88 OREGON, 451.]

NEGLIGENCE—INSTANTANEOUS DEATH.—The Oregon statute giving to the personal representatives of a person whose death was caused by the wrongful act of another, a right of action against that other for such death, is not a "survival statute," but creates a new cause of action, and therefore it makes no difference in the right to maintain the action whether the death of the deceased was instantaneous or not.

NEGLIGENCE—ACTION FOR DEATH—STATUTORY CONSTRUCTION.—The fact that the damages recoverable under a statute allowing an action for wrongful death, become, under such statute, assets of the estate of the person whose wrongful death is sued for, is immaterial to the determination whether the statute is simply a survival statute or one creating a new cause of action.

NEGLIGENCE—ACTION FOR DEATH.—In the absence of statute, no cause of action exists for wrongfully causing the death of a human being.

NEGLIGENCE—ACTION FOR DEATH—NO SURVIVING RELATIVES OR CREDITORS.—Where a cause of action for wrongful death is created in favor of the personal representative of one whose death was wrongfully caused, it is not necessary for a personal representative to set forth in his complaint in such an action that deceased left surviving relatives or creditors, although the statute directs that the amount recovered shall become

a part of the estate of the deceased, to be administered upon as other personal property.

NEGLIGENCE—ACTION FOR DEATH—STATUTORY CONSTRUCTION.—Where a statute creating an action for death directs that the amount recovered in such an action shall become assets of the "estate" of the deceased person, the word "estate" is not used in its technical sense of meaning the property left by him, but simply to distinguish between the measure of damages under such statute from that prevailing under statutes similar to Lord Campbell's act, in which the recovery is for the benefit of some designated individual.

NEGLIGENCE—ELECTRIC WIRES.—A prima facie case of negligence is made out against an electric company, where it appears that, knowing that a railroad bridge over which it placed its wires must, from time to time, require repairs, and that, owing to the high voltage of electricity carried, the wires could not be so insulated as to render them safe to persons coming in contact with them. It nevertheless so placed the wires that persons could not make such repairs without coming in deadly contact therewith.

NEGLIGENCE—CONTRIBUTORY—ELECTRIC WIRES.—A workman whose duty it is to work where contact with electric wires is unavoidable, and to whom the owner of the wires owes a duty to exercise due care and caution to protect him from injury, is justified in assuming that such duty has been performed; and where, to such workman's nonexpert knowledge, there is no apparent danger from contact with the wires, he cannot be deemed guilty of contributory negligence, as a matter of law, if, by coming in contact with such wires, he is killed.

ELECTRIC COMPANIES.—IMPERFECT INSULATION OF ELECTRIC WIRES acts as an invitation to persons working among them to risk the consequences of contact with them.

ELECTRIC COMPANIES—DUTIES OF.—While electric companies are not bound to have perfect apparatus or construction, yet where their wires are designed to carry strong and powerful currents of electricity, so that persons coming in contact with them must be seriously injured, or killed, it is the duty of such companies to exercise the utmost care to prevent such injury, and whether this duty has been performed in a given case is ordinarily for the jury.

APPEAL—NONPREJUDICIAL REFUSAL TO GIVE INSTRUCTIONS.—Where an instruction, which correctly states the law, and might with propriety be given, is asked for and refused, such refusal does not constitute reversible error when shown to have been without prejudice.

JURY TRIAL—INSTRUCTIONS—GENERAL ACCURACY.—Although instructions, as given by the trial court, contain verbal inaccuracies, yet if, when taken as a whole, they fairly present the law applicable to the case, they will be held sufficient on appeal.

NEGLIGENCE—WHAT IS—ELECTRIC WIRES.—"Care" and "diligence," when used in discussing negligence, are relative terms, deriving their significance from the circumstances in hand. When applied where people are dealing with electricity, they mean the highest care and vigilance possible under the existing condition of science.

F. V. Holman and Richard & E. B. Williams, for the appellant.

H. W. Hogue, W. W. Thayer, and Sanderson Reed, for the respondent.

⁴⁵² BEAN, J. This action is brought under section 371 of Hill's Annotated Laws to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant company. The facts, which are practically undisputed, are that on September 27, 1893, the plaintiff's intestate, an employé of the East Side Railway Company, a corporation owning and operating a suburban railway between Portland and Oregon City, was killed while engaged in repairing its bridges across the Clackamas river by coming in contact with wires owned and used by the defendant company for the transmission of electricity from its station in Oregon City to its customers in the city of Portland, and which were suspended over and horizontal with such bridge. This bridge is described by the witnesses as a Howe truss with half-hip connections, twenty-two feet wide, and the distance between the top and bottom chords is thirty-five feet. Near the ends of each top chord are four vertical iron rods with nuts and ⁴⁵³ washers, connecting the top and bottom chords, and the top chords are connected together by six by eight lateral braces set on edge, crossing each other in the shape of the letter X, and also by iron rods, about an inch in diameter, at either extremity. The main end braces of the bridge run from the ends of the top chords to the outer ends of the bottom chords at an angle of forty-five degrees, and are connected together by cross-braces similar to the top lateral braces, and also by two timbers five and one-half by nine and one-half inches, called "strut braces," placed horizontally above and below the cross-braces. The upper strut brace is four and one-half inches below the under side of the top chord, or twenty and one-half inches below the upper surface thereof, and the most southerly lateral rods connecting the top chords of the bridge is twenty-two inches north thereof, and thirteen inches higher than its upper surface. Under a license from the railway company, the defendant had, at the time of the accident, ten wires strung lengthwise and thirty-five inches above the top of the bridge, which were attached to pins in cross-braces or arms extending from one side of the bridge to the other, and supported by standards resting on the top chords. The wires were placed one foot apart, except the two on the west side, between which there was a space of two feet.

On the 15th of September, 1893, the railway company sent a gang of men under charge of a foreman to repair the bridge, and they were engaged in such work until some time in the following month. While thus engaged, it became necessary to

tighten the nuts on the vertical rods connecting the top and bottom chords, and, as this could not be done on the south end of the bridge without moving the arm or brace to which the electric wires were attached, the foreman telephoned, on the morning of the 27th of September, to the office of the railway company in Portland, asking that a ⁴⁵⁴ lineman be sent out to detach the wires, so that the arm could be moved, but, as the company neglected to do so, he concluded to go on with the work and do the best he could. He thereupon directed the deceased and three other workmen to go up on top of the bridge and tighten the nuts on the rods with a large wheel wrench seven feet and eight inches in diameter. The wheel part of this wrench was some fifteen or sixteen inches above the socket which fitted on the nut, and the wrench was operated by workmen sitting outside of the wheel on the chords or braces of the bridge, or boards placed thereon. Before working in and among the wires, the workmen examined them, and, finding that they were covered with the insulating material in common use, and that such covering was unbroken, and apparently in good condition, and receiving no injurious effect from handling them, concluded that they were safe. At the time this examination was made the wires were what are called "dead wires," as the electric current was shut off about eight o'clock in the morning and not turned on again until about four in the afternoon, but of this fact the workmen were ignorant, and they supposed and believed that the wires were live wires all the time, and that the reason they were harmless was because of the insulation. Along in the afternoon, the deceased and his fellow workmen, having completed the work at the north end of the bridge, proceeded to the south end for the purpose of tightening the rods on that end, but, being unable to place the wheel wrench on the nuts because of the standard which supported the cross-bar to which the wires of the defendant company were attached, they were directed by the foreman to move it out of the way. At this time the two wires on the west side of the bridge were live wires, but this fact was unknown to the workmen. They proceeded to detach a sufficient number of the wires, beginning at the east side ⁴⁵⁵ of the bridge, to enable them to move the east end of the south standard or support a sufficient distance north to permit the use of the wheel wrench; and after taking out the lag screws, which fastened the standard to the top chord, the deceased was directed by the foreman to cross over to the west side of the bridge to a hand line and draw up the tools

necessary to be used in fastening the standard out of the way of the wrench. In obedience to this order, he started to walk over on one of the top lateral braces, stepping over the wires and steadying himself by touching them with his hands, and when he reached the two west wires, which were carrying at that time five thousand volts of electricity, he accidentally took hold of both wires at the same time, and the entire force of the current passed through his body, killing him instantly.

The complaint alleges: That at the time the defendant so placed its wires over the bridge of the railway company it well knew it would be necessary from time to time for such company to cause the bridge to be repaired, and for persons to work upon the top chords and braces thereof; but, notwithstanding such knowledge, it carelessly and negligently strung its wires only two and one-fourth feet above such chords and braces, and in such a manner that it was not possible or practicable for persons to work upon such bridge without coming in contact with and handling the same; and that it carelessly and negligently failed and omitted to protect or cover the wires, and particularly the two west ones, with safe or sufficient insulating material, and that it carelessly and negligently permitted the covering used thereon to become worn, defective, and wholly insufficient to render them safe to persons coming in contact therewith; that it knew the bridge was being repaired during all the times referred to, and particularly on the twenty-seventh day of September, and that it ⁴⁵⁶ might be necessary at any time between the hours of 7 o'clock in the morning and 5:30 o'clock in the afternoon of that day for the workmen to move about among and come in contact with its wires, and that it was not possible or practicable for them, nor for anyone, to go upon or work upon the top chords or the top lateral braces without so doing; and that it also knew that the deceased was engaged in the work of tightening the vertical rods during the afternoon of the 27th, and that he was necessarily moving about among and coming in contact with and handling the wires, but that, notwithstanding such facts, it carelessly and negligently caused and permitted a high and dangerous current of electricity to be turned into the two wires nearest the west side of the bridge at about 4:20 o'clock in the afternoon, without notice or knowledge to the deceased or any of his fellow workmen; and that the deceased, while engaged in the performance of his duties and exercising due care and caution, and without any fault on his part, came in contact with said wires, and

was instantly killed; that all the workmen on the bridge, including the deceased foreman, thought and believed it was perfectly safe for them to move about among and touch and handle the wires referred to, because the same seemed to be insulated, but they had no knowledge of the time the current was turned into the wires, but thought and believed they were charged with electricity and were live wires at all times. Then alleges the appointment of the plaintiff as administrator of the estate of deceased, and upon the question of damages avers: "That said Nathaniel Carl Perham at the time of his death was twenty-five years and six months old, unmarried, strong, healthy, temperate, industrious, frugal, of good intelligence and business capacity, and was a skillful carpenter and bridge carpenter and contractor, and was earning and receiving ⁴⁵⁷ wages at the rate of three dollars per day, and would, if he had continued to live during the ordinary period of life, have continued to earn and receive the same and even greater wages for his services, and would have accumulated property and estate to the present value of twenty thousand dollars, and that by reason of his death, occasioned by the negligence and wrongful acts and omissions of the defendant, as hereinbefore set forth, plaintiff, as administrator of said estate, has been injured and damaged in the sum of twenty thousand dollars"; and prays for judgment against defendant for the sum of five thousand dollars, being the limit of a recovery permitted by the statute.

The defendant, by its answer, admits that at the time it placed its wires on and along the bridge in question it knew that it would be necessary to repair the bridge from time to time, and that in doing so persons would be required to go and be upon the top chords and top lateral braces thereof, but it denies that its wires were so placed that it would be necessary for such persons to come in contact therewith, or move about among or handle the same, or that it failed or omitted to protect or cover its wires with proper or sufficient insulating material, or that it permitted the covering used to become worn or defective. But it alleges that it is impracticable to insulate wires carrying such a high voltage as was carried over the wires in question so that they will not be dangerous to the life of persons coming in contact with two of them at the same time; that all of its wires were attached by proper and sufficient glass insulators to wooden cross-bars or arms at a height of not less than two feet and ten inches above the top chords and top lateral braces of the bridge, and were new and perfect wires,

and the insulating used thereon was in perfect order and condition. It is further alleged that the deceased was guilty of contributory negligence in attempting to step ⁴⁵⁸ over the wires in crossing the bridge, but that he should have passed under them, either by creeping along on top of the lateral braces or by crossing on the strut brace at the south end of the bridge, which was about four and one-half feet below the wires. The reply put in issue the material allegations of the answer, and, a trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals, alleging as error: 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That the court erred in overruling its motion for a nonsuit; and 3. That the court erred in the giving and refusal of certain instructions to the jury.

It is claimed at the outset that the action cannot be maintained, because the statute under which it is brought is a survival statute, and, as the complaint alleges and the evidence shows, that the death of plaintiff's intestate was instantaneous. There was no interval of time between the injury and the death within which the deceased could have brought an action for the injury, and therefore there was no right of action to survive to his personal representatives. The statute provides that a cause of action arising out of an injury to the person dies with the person, except that, "when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person": Hill's Annotated Laws, secs. 369, 371. It is agreed that at common law there was no remedy by way of a civil action for the death of a human being, and that a cause ⁴⁵⁹ of action arising out of an injury to the person died with the person. But the practical impossibility of securing the punishment of mere carelessness by means of a criminal action induced the British parliament in 1846 to pass what is known as "Lord Campbell's act," by which a civil remedy is given to the personal representative of one whose death is caused by the wrongful act or omission of another for the benefit of the widow, husband, parent, or child of such person. This

statute has been in substance, in one form or another, incorporated into the legislation of most of the states of the Union, and the holding is quite universal that it creates a new right of action for the wrongful death, which may be maintained whether it was instantaneous or consequential: 1 Shearman and Redfield on Negligence, sec. 139; Cooley on Torts, 264; Seward v. Vera Cruz, L. R. 10 App. Cas. 59. But the contention for the defendant is that the statute of this state, unlike Lord Campbell's act and the statutes modeled after it, does not create a new right of action for the death, but is a survival statute, under which the personal representatives of a deceased person may bring an action to recover damages for the injury which caused the death in cases where the party injured was entitled to bring such action, but died before exercising such right; and in support of this view we are referred to Belding v. Black Hills R. R. Co., 3 S. Dak. 369; Kearney v. Boston R. R. Corp., 9 Cush. 108; Bancroft v. Boston R. R. Corp., 11 Allen, 34; Corcoran v. Boston etc. R. R. Co., 133 Mass. 507; Riley v. Connecticut River R. R. Co., 135 Mass. 292; Mulchahey v. Washburn Wheel Co., 145 Mass. 281, 1 Am. St. Rep. 458; Maher v. Boston etc. R. R. Co., 158 Mass. 36; Illinois Cent. R. R. Co. v. Pendergrass, 69 Miss. 425.

But the statutes under which these decisions were ⁴⁶⁰ made are essentially different from ours. The statute of South Dakota provides (Comp. Laws, sec. 5498) that, if the life of any person not in the employment of a railroad company shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, his personal representatives may institute suit to recover damages in the same manner that the person might have done for any injury where death did not ensue; and (Comp. Laws, sec. 5499) that, if the life of any person is lost or destroyed by the neglect, carelessness, et cetera, of another person, company or corporation, et cetera, the widow, heir, or personal representative of the deceased shall have the right to sue and recover damages for the death of such person; and the court held, in the case referred to, that under these provisions of the law a personal representative could not recover for the loss of the life of his intestate, but that such right was conferred exclusively upon the widow or heir, and the personal representative could only recover such damages as the deceased had suffered up to the time of his death. For that reason no action could be maintained where the death was instantaneous. The supreme court of Kentucky, however, in *Givens v. Ken-*

tucky Cent. R. R. Co., 89 Ky. 231, reached a different conclusion under a similar statute. The statute under which the Massachusetts decisions were made provides that "the action of trespass on the case, for damages to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living" (Stats. 1842, c. 89, sec. 1); and, as Mr. Chief Justice Shaw says in *Kearney v. Boston R. R. Corp.*, 9 Cush. 108, "supposes the party deceased to have been once entitled to bring an action for the injury, and ⁴⁶¹ either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right." It is therefore held in that state, under what Judge Cooley characterizes (*Cooley on Torts*, 264) as "a somewhat nice and technical construction of the statute," that the action will not lie when the death is instantaneous, but, if there is the slightest interval between the accident and the death, it can be maintained; and that the right does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the deceased after he is injured and before his death. The Mississippi statute declares that "executors, administrators, and collectors shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted," and that "executors and administrators shall have an action for any trespass done to the person . . . of their testator or intestate against the trespasser, and recover damages in like manner as the testator or intestate would have had if living, and the money so recovered shall be assets and accounted for as such": Code, secs. 2078, 2079. The court held that the purpose of the statute is "to save to personal representatives the right to begin and carry on such personal actions as the deceased might have begun and carried on if he had not died," and that the personal representative can have no standing in court where the death is simultaneous with the injury, but in such cases all recoverable damages must be sought by the kindred who have sustained the loss.

It thus appears that the statutes construed by the decisions relied upon by the defendant were, as interpreted by the courts, in each instance designed to prevent a cause of action accruing to the deceased in his lifetime ⁴⁶² for an injury to his person from being defeated by his subsequent death, and not

to create a new cause of action for the death. But such is manifestly not the purpose or effect of our statute. It provides that, when the death of a person is caused by the wrongful act or omission of another, his personal representative may maintain an action therefor—that is, for the death—if the deceased might have maintained an action, had he lived, for the injury which caused the death. The language of the statute is plain and its meaning obvious. It clearly creates a new right of action in favor of the personal representative for the death itself, and not an action founded on survivorship, or on any cause of action in favor of the deceased. The death, and not the injury from which the death results, is the cause of action under the statute, and the personal representatives are entitled to recover damages for the wrongful taking away of the life itself; and therefore it makes no difference whether the injured party was killed instantly or not. Nor does it matter that the damages recovered become assets of the estate, to be administered upon as other personal property of the deceased, and do not go to certain designated persons, as provided in Lord Campbell's act, and in many states of this country. This is but a statutory direction as to the disposition to be made of the damages to be recovered, and does not determine the question as to whether the statute creates a new right of action or is only a survival statute. In the absence of the statute, no right of action for the death exists in favor of any person, and it was clearly competent for the legislature, in creating this new right, to make such provision as to the disposition of the damages recovered thereunder as it might see proper.

The statutes of the various states which have in substance adopted Lord Campbell's act differ widely in this ⁴⁶³ respect, and it has never been suggested, so far as we are aware, that for this reason they do not give a cause of action for the death. And actions brought under section 371 have repeatedly been before this court in one form or another, and it has always been assumed that the action was for the death, and that it made no difference, either in the right to maintain it or in the amount recovered, whether the deceased was killed instantly or not: *Carlson v. Oregon etc. R. R. Co.*, 21 Or. 450. And the same construction has been put upon the statute by the federal courts. In *The Oregon*, 73 Fed. Rep. 846, Mr. Justice Bellinger, speaking of the effect of section 371, says: "The Oregon statute, unlike that of Louisiana, does not provide that causes of damage to another shall survive in case of death. It is substantially

like Lord Campbell's act; and in the case of *Seward v. Vera Cruz*, L. R. 10 App. Cas. 59, the view held was (Lord Blackburn concurring), not that the cause of action survived, but that 'a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern R. R. Co.*, 4 Best & S. 396, is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss by the death.' In the case of *Pym v. Great Northern R. R. Co.*, 4 Best & S. 396, cited in the foregoing quotation, it was argued in behalf of the defendant that the action maintainable under Lord Campbell's act by the personal representatives of a deceased person is 'a mere continuance of that which would have accrued to the deceased if he had lived'; but Erle, C. J., said: "The statute, as it appears to me, gives to the personal representatives a cause of action beyond that which the ⁴⁰⁴ deceased would have if he had survived, and based on different principles': *Pym v. Great Northern R. R. Co.*, 4 Best & S. 403. And so in *The City of Norwalk*, 55 Fed. Rep. 98, the court considers the right 'a new right,' which is 'none the less maritime because based upon state legislation, where the subject matter is maritime.'" And in *Holland v. Brown*, 35 Fed. Rep. 43, Mr. Justice Deady said, concerning the same statute: "The action given by the statute is for the death simply. This includes, of course, all such losses to his estate, or creditors and next of kin to whom it belongs, and for whose benefit the action is allowed, as may be fairly implied from the cessation of his life. The fact on which the damages are computed is death and its consequences, and not its antecedents or cause": See, also, *Lung Chung v. Northern Pac. Ry. Co.*, 10 Saw. 17, 19 Fed. Rep. 254, and *Ladd v. Foster*, 12 Saw. 547, 31 Fed. Rep. 827.

The statutes of Kansas and Indiana are identical with ours, except that damages are allowed to the extent of ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin. Mr. Justice Brewer, in *Hurlbert v. Topeka*, 34 Fed. Rep. 510, referring to the Kansas statute, says it "gives a new right of action—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages

which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an action under section 422; and the single question is, How much has the wrongful taking away of his life ⁴⁶⁵ injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which accrued to the decedent before his death." And to the same effect see *Martin v. Missouri Pac. R. R. Co.*, 58 Kan. 475; *Eureka v. Merrifield*, 53 Kan. 794; *McCarthy v. Chicago etc. R. R. Co.*, 18 Kan. 46, 26 Am. Rep. 742; *Missouri Pac. R. R. Co. v. Bennett*, 5 Kan. App. 231.

In Indiana it has been held that, while the statute does not in terms "revive the common-law right of action for personal injury nor make it survive the death of the injured person," it does "create a new right in favor and for the benefit of the next of kin or heirs of the person whose death has been wrongfully caused": *Burns v. Grand Rapids R. R. Co.*, 113 Ind. 169. The questions determined in the adjudged cases on the right of the personal representatives of one whose death was caused by the wrongful act or omission of another to maintain an action for damages against the latter arose under such dissimilar statutes that the decisions afford but little light upon the interpretation of any particular statute at variance with the one under consideration in the given case, and hence it is useless to attempt any further examination of them at this time. However, the following authorities are more or less in point in the present discussion, and, in the main, tend to support our conclusion as to the proper construction of the statute: *Shearman and R dfield on Negligence*, sec. 139; *Cooley on Torts*, 264; 2 *Thompson on Negligence*, 1283; *Tiffany on Death by Wrongful Act*, sec. 73; *Brown v. Buffalo R. R. Co.*, 22 N. Y. 191; *Roach v. Consolidated Min. Co.*, 7 Saw. 224, 7 Fed. Rep. 698; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Murphy v. New York etc. R. R. Co.*, 30 Conn. 184; *Givens v. Kentucky Cent. R. R. Co.*, 89 Ky. 231; *Connors v.* ⁴⁶⁶ *Burlington R. R. Co.*, 71 Iowa, 490, 60 Am. Rep. 814; *Worden v. Humeston etc. R. R. Co.*, 72 Iowa, 201; *Nashville R. R. Co. v. Prince*, 2 Heisk. 580.

It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. Under the provisions of

Lord Campbell's act, and statutes which, like it, give a right of action for the death of a person caused by the wrongful act of another for the benefit of certain designated relatives, no action can be maintained at all unless the deceased left at least one surviving relative of the class specified, and the complaint must necessarily show that fact: 1 Shearman and Redfield on Negligence, sec. 135; *Stewart v. Terre Haute etc. R. R. Co.*, 103 Ind. 44. In such case, the executor or administrator, in prosecuting the action, is a mere nominal party, who sues for the benefit of the real party in interest; and such damages as he may recover do not go to the estate of the deceased, nor belong to him in his representative capacity, but to the person for whose benefit the right of action is given by the statute: *Blake v. Midland R. R. Co.*, 18 Q. B. 93; *Bradshaw v. Lancashire R. R. Co.*, L. R. 10 Com. P. 189. The theory is that those entitled to the benefit of the statute have a pecuniary interest in the life of the deceased, and the recovery is to compensate them for the pecuniary loss they have sustained. In short, a new right of action is created for the benefit of certain designated persons, and, consequently, can be maintained only when the deceased left surviving him some one entitled to its benefit. Thus, where a statute gives a right of action for the benefit of the widow and next of kin, a husband, not being the next of kin to his wife, is not within its terms, and an action cannot be maintained if the deceased leave a husband ⁴⁶⁷ only: *Lucas v. New York Cent. R. R. Co.*, 21 Barb. 245; *Central R. R. etc. Co. v. Dixon*, 42 Ga. 327. So, also, where the statute is for the benefit of the widow and children, no recovery can be had when the deceased left no widow or children: *Commonwealth v. Boston etc. R. R. Co.*, 121 Mass. 36. But it will be observed that the right of action created by our statute is not for the benefit of any particular person, but the damages recovered become assets of the estate, to be applied by the administrator to the payment of debts, or distributed as the exigencies of the estate and the laws governing the distribution of personal property may direct. Under Lord Campbell's act, and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute, while under our statute they belong to the estate, and are co-extensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the

designated relatives, and in the other the value of the life lost measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life: *Carlson v. Oregon etc. Ry. Co.*, 21 Or. 450.

It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors, or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue ⁴⁶⁸ of being creditors, or of kinship; and, if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action. It is ingeniously argued, however, that an estate of a deceased person can in no way be damaged by his death, and this is probably true if the word "estate" is to be taken in the technical sense of meaning the property left by him. But it is not so used when speaking of the measure of damages for the wrongful death of a person. It is thus used as a convenient term to distinguish the rule as to the measure of damages under our statutes from the one prevailing under statutes similar to Lord Campbell's act, and in which the recovery is for the benefit of some designated individual.

This brings us to the important question whether the defendant's motion for a nonsuit should have been sustained. It is undisputed that the wires which caused the death of plaintiff's intestate were placed by the defendant in a position where they would probably be exposed to contact by persons working on the bridge, although it knew that it would be necessary to repair the structure from time to time; and it admits and alleges that it is not practicable, in the present knowledge of the science of electricity, to insulate wires so as to make them safe, and not dangerous to persons coming in contact with them, when charged with the high voltage of electricity carried over the wires in question. This is, in our opinion, sufficient to make out a *prima facie* case of negligence, because it tends to support the main ground of recovery relied upon by the plaintiff, viz., that, although the defendant knew it would be neces-

sary from time to time for the railway company to send men on top of the bridge to make needed repairs, it placed its wires to be used in the transmission of such a high ⁴⁶⁹ voltage of electricity as inevitably to cause the instant death of any person coming in contact with two of them at the same time in such a position that it was impracticable, if not impossible, to make such repairs without doing so.

It is contended, however, that the deceased was guilty of contributory negligence: 1. In going on top of the bridge to work without ascertaining from the defendant company, or someone having knowledge on the subject, whether it would be safe to come in contact with the defendant's wires; and 2. In attempting, at the time of the accident, to cross from one side of the bridge to the other by walking on the top lateral braces and stepping over the wires, rather than crossing on the end strut brace and under the wires. But both of these contentions proceed on the theory that he was chargeable with knowledge of the fact that the wires were dangerous, and, having voluntarily exposed himself to the risk of contact therewith, must take the consequences of his own conduct. And, indeed, this is the underlying question on this branch of the case. The deceased was unquestionably guilty of such negligence as will preclude a recovery if he is to be charged with knowledge that the defendant's wires, although apparently harmless, were in fact dangerous; for he could have avoided coming in contact with them. But, on the other hand, it cannot be ruled as matter of law that he was negligent in going on the bridge to work or in crossing on the top lateral braces, if the defendant owed to him the duty of exercising reasonable care to prevent injury to him from contact with its wires while at his work. There is evidence tending to show that he acted with due care and caution, and did not heedlessly or recklessly expose himself to contact with the wires. It was only after they had been examined, and their apparent safety ascertained, that ⁴⁷⁰ he and his fellow workmen ventured to work at a place where they would probably or necessarily come in contact with the wires; and there is evidence to the effect that the usual and customary way for men employed in the construction or repair of a bridge of the character in question to cross from one top chord to the other is by walking on one of the top lateral braces. Unless, therefore, the case should have been withdrawn from the jury on the ground that the deceased was bound, at his peril, to ascertain whether the wires were in fact dangerous

before working at a place on the bridge where he would be likely to come in contact with them, there was no error in denying the motion for nonsuit, and submitting the issue of negligence as respects the defendant and plaintiff to the jury; and we do not think any such doctrine as the one suggested can be maintained either upon reason or authority.

It is not claimed that the deceased had any more knowledge of electricity or its effects than such as is possessed by persons of average intelligence. He knew that there is such a force carried by wires and used in driving cars and lighting streets and houses, and that the wires in question were used for that purpose; but he supposed, as is the common understanding, that the insulating material with which such wires are covered is placed there for the purpose and with the result of making them safe. He had no knowledge of the fact, as this record discloses, that wires are used for the transmission of electricity, which, on account of the high voltage carried, cannot be insulated at any reasonable cost so as to make them safe, and that the insulating material sometimes used thereon affords no protection from injury. Nothing can, therefore, be claimed in this case on account of any special knowledge of electricity or its effect possessed by the deceased; and there is no pretense that ⁴⁷¹ he knew the wires were in fact dangerous, and, as he was not the agent or servant of the defendant company, he was not, in our opinion, chargeable with such knowledge, nor did he assume any risk on account of the wires unless he knew the danger and voluntarily exposed himself to it. He was not a trespasser or licensee bound to take the premises in the condition in which he found them, but the servant of the railway company, lawfully on the bridge, engaged in an employment which, according to the testimony, necessarily required him to come in contact with the wires of the defendant company. These wires were visible, insulated, and to all appearances perfectly harmless. There was nothing in their appearance to warn the deceased of the great force being carried over them, or that there was any danger in coming in contact with them. The danger was a hidden and secret one, and the insulation of the wires deceptive. The familiar rule that one who deliberately goes into a place of known or apparent danger and is injured must take the consequences of his hardihood can have no application here, because there was in fact no apparent danger, but, on the contrary, so far as the deceased—a nonexpert—could ascertain from an examination, the wires were entirely safe, and in perfect

condition. He had a right, therefore, to believe that the place was safe, and to assume that the defendant company had exercised due care and caution to prevent injury to him, and had not placed on the bridge, in such a position that he would likely come in contact with them, wires which it knew to be dangerous. It was using the bridge by permission of the railway company for the support of wires used in the transmission of a highly dangerous, subtle and invisible force, and was, therefore, chargeable with the duty of placing and keeping them, as far as practicable, in a condition to avoid injuring the servants of ⁴⁷² the railway company while at their work. Its duties and responsibilities in this respect are similar to those of an electric company which, by permission of the owner, places its wires over the roof, or attached to a house or building; and in such case the rule is quite universal that the company is liable to the owner and his servants for an injury received through its negligence by contact with such wires when making needed repairs or improvements to the building, if the injured party is in the exercise of due care and caution at the time.

The question respecting the care required of electric companies under such circumstances first came before the courts in the case of *Clements v. Louisiana Electric Light Co.* (1892), 44 La. Ann. 692, 32 Am. St. Rep. 348. In that case the plaintiff's intestate—a tinsmith engaged to assist in repairing the roof—was killed while at his work by coming in contact with the wires of the defendant company, placed two feet four inches above the roof. The wires were insulated, and to all appearances safe, but there was a defect in the insulation which caused his death while he was either attempting to step over or go under the wires, in trying to reach the gutter. The court held, after mature deliberation, that the company was responsible. And although there was involved in the case a failure to comply with a municipal ordinance, requiring electric light companies to have the splices of their wires perfectly insulated, it was considered that this ordinance added nothing to the duty or liability of the company. The court says, in speaking upon this matter, that "it [the wire] passed over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, ⁴⁷³ to see that their lines were safe for those who, by their occupation, were brought in close proximity to them." And in answer to the objection that deceased

was guilty of contributory negligence, it said: "The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with the defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in doing so he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe it was safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not latent, defects. Had he known of the defective insulation and put himself in contact with the wire he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of insulation and the negligence of the defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger."

So, also, in *Giraudi v. Electric etc. Co.*, 107 Cal. 474 120, 48 Am. St. Rep. 114, the plaintiff was sent on top of a building by the owner to adjust a sign which was about to be blown down by the wind, and, coming in contact with an electric light wire, placed along and near the roof, was injured, and it was held that the failure of defendant to place its wires a sufficient distance above the roof to enable persons lawfully thereon to pass under them was sufficient proof of negligence to justify the verdict, and that plaintiff was not guilty of contributory negligence by going on the roof. The court say: "Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there

was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, *res ipsa loquitur*. The point most insisted upon here is that plaintiff was guilty of contributory negligence; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know, there was no evidence which even tended to show negligence on his part." And again, in *Ennis v. Gray*, 87 Hun, 355, the plaintiff, a roofer, employed by the owner of a building, was injured while at his work by coming in contact with an electric light wire of the defendant, which was ⁴⁷⁵ attached to the building, and which the evidence tended to show was placed without proper safeguards and improperly insulated, and the court held that the issue as to the defendant's negligence and the contributory negligence of the plaintiff was for the jury. In this case the defendant tried to escape liability by claiming that there was no contractual relation or other privity between it and the plaintiff which required it to protect him while at work for the owner of the building, and while on his premises, and that as to him the construction and maintenance of electric apparatus were *res inter alios*. But the court held that the defendant was engaged in the business of supplying electricity for lighting purposes, and, considering the high voltage which it was necessary to carry over its wires, the business was of a character highly dangerous and likely to result in injury to others unless conducted with care and skill; and therefore, outside of any contractual relation, the law imposed the duty upon defendant of using the necessary skill and prudence to prevent injury to persons coming in contact with its wires, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he was entitled to be.

So also in *McLaughlin v. Louisville Electric Light Co.*, 18 Ky. L. R. 693, a person engaged in painting a building was injured by coming in contact with an imperfectly insulated electric wire on the side of the building, while climbing out of a window upon the cornice, and, in an action against the electric company to recover damages for the injury, it was held that the defendant was bound to exercise the utmost care to keep the

insulation of its wires perfect at a place where people had a right to go for work, business, or pleasure, although very great care may be sufficient for wires at other places; that an apparently properly ⁴⁷⁶ insulated wire is an invitation or inducement to such person to risk the consequence of contact with it; that the fact that the insulation of such wires is expensive or inconvenient is no excuse for failure to make such insulation perfect at places where people have a right to go; and that the plaintiff in the action was not guilty of contributory negligence in coming in contact with the wires unless, in so doing, he failed to exercise the degree of care which an ordinarily careful and prudent person usually exercises under similar circumstances, and the question whether he exercised such care was for the jury and not the court. A like principle was applied in *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583. The plaintiff was employed in the fire alarm system of the city of Boston. The city used for the lines of its system structures erected by the defendant electric company for the support of its electric wires. While the plaintiff was in the performance of his duties and descending one of such structures, the pliers in his belt caught in a wire belonging to the defendant, and in reaching around to clear them he received injury by the contact of his hand with a wire of the defendant not properly insulated; and it was held, in an action against the company for damages, that the defendant's negligence in leaving the joints of its wires without insulation at such place, and the question whether the plaintiff was in the exercise of due care, should have been submitted to the jury. So, also, in *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, a tinsmith, while engaged in placing an iron conductor on a building, was injured by receiving a shock from an electric light wire running along the side of the building, about twelve feet from the ground, by reason of the conductor which he was handling coming in contact with a place on the wire ⁴⁷⁷ where the insulating material had been worn off, and it was held that the question of defendant's negligence and of due care on the part of plaintiff were for the jury, and that it could not be said, as a matter of law, that the condition of the wire was so apparent that the plaintiff must or ought to have seen it, although the accident happened in the forenoon; and that, while an expert might consider it dangerous to touch any wire unless he knew it was a harmless one, no such degree of care could be required of the plaintiff, who was not an expert, but that the question of his want of care was for the jury.

Applying the doctrine of these cases, and the underlying principles by which they are controlled, to the case in hand, it is clear that no error was committed in overruling the motion for nonsuit. It is true that in the cases referred to the actions were grounded on negligence in using improperly insulated wires, but in each instance the judgment of the court proceeds on the theory that it is a want of due care for a company handling and transmitting the highly dangerous force of electricity to use a wire known, or which reasonably ought to have been known, to be dangerous, at a place where others are lawfully entitled to be; and it is assumed in each instance that, but for the insufficient insulation, the wires would have been safe. The same principle governs here. Although the wires of the defendant company were insulated, it is admitted that such insulation was no protection whatever to persons coming in contact with them, and hence the negligence of the defendant is equally as great, if not greater, than if the danger had been from insufficient or want of insulation. The apparently perfect insulation was calculated to deceive, and to cause one unfamiliar with the facts to suppose the wires safe. It acted as an invitation to persons at work in and among the wires to risk the consequences of contact ⁴⁷⁸ therewith. And such was the effect in this case. But for the insulation, and the belief of safety caused thereby, it is not at all probable that the deceased would have exposed himself to the risk of a contact with the wires in question. The defendant, however, knew that the insulation afforded no protection, and yet, with knowledge of that fact, put its wires in a place where the servants of the railway company might come in contact with them while in the performance of their duties, and without giving any warning or notice of the danger whatever. Under such circumstances a jury would certainly be justified in finding that it did not exercise due care and caution in so doing. Electric companies, of course, are not bound to have perfect apparatus or perfect construction, but they are required to exercise a degree of care and prudence in the construction and maintenance of their wires commensurate with the danger; and where their wires are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury; and whether such care has been exercised in a given case is ordinarily for the jury: *Croswell on Electricity*, sec. 234.

The cases cited and relied upon by the defendant are not in point in this contention. In *Beck v. Vancouver Ry. Co.*, 25 Or. 32, *Salem-Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27, *Salem-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217, and *Flood v. Western Union Tel. Co.*, 131 N. Y. 603, the danger was open and visible, and could have been ascertained by the complainant if he had exercised his faculties. In *Hector v. Boston Electric Light Co.*, 161 Mass. 558, the facts are that a lineman of a telephone and telegraph company ⁴⁷⁹ was sent to attach a wire to a standard owned by the defendant on the roof of a building. Instead of entering this building, and going out on the roof, he went up on a building some distance away, passed over the several intervening structures until he came to the building adjoining the one on which the standard was placed. While stooping down to see how he could get from this building to the place of his destination, he came in contact with the wires of the defendant company, and was injured by reason of the insulation being worn off. The case was decided in favor of the defendant, on the ground that it owed no duty to the plaintiff to maintain an effective insulation at the place where he was injured, where he was not sent to work, and where he had no right to be. The same is true of the case of the boy who was killed by coming in contact with the wire of an electric company while searching on top of a building for a lost ball: *Sullivan v. Boston etc. R. R. Co.*, 156 Mass. 378. In both cases the injured party was a trespasser, and at a place where he had no right to be, and where the company was under no obligation to protect him from injury. But in the case at bar the deceased was rightfully at the place where he was injured. In *McMullan v. Edison Electric Co.*, 13 Misc. Rep. 392, 34 N. Y. Supp. 248, the defendant company had disconnected its service wires, carrying a low current of electricity, which could not cause death or great bodily harm, from the distributing wires in the cellar eight feet above the ground, in order that the owner might make certain repairs, but failed to "tape" the ends of the wires, and it was held that it was not liable for an injury to a workman while engaged in making such repairs, because no reasonable person would, under the circumstances, have anticipated "that any person would have entered this ⁴⁸⁰ cellar mounted upon a box, and, after seeing these wires, taken hold of at least two of them at the same time, in such a manner as to make a short circuit, or bring the two wires in contact with his hand near the same point, and thus burn his hand." In

Burk v. Edison General Electric Co., 89 Hun, 498, 35 N. Y. Supp. 313, the evidence shows that the deceased deliberately chose a way of known danger to go from one part of a cellar to another, when a perfectly safe way was open to him, and the court held that he must take the consequences of his own hardihood.

It only remains to notice briefly the assignments of error based upon the giving and refusal of instructions by the trial court. The defendant requested in writing some fourteen different instructions, which were refused, except as given in substance in the general charge. All of these, except one, present different phases of the questions already considered, and therefore require no further notice. By the eighth request the court was asked to charge the jury that, if they should find for the plaintiff, they could not estimate nor give exemplary or vindictive damages, nor any damages as a solatium for the grief or anguish of the surviving relatives, or the pain or suffering of the deceased. And while this instruction embodies a correct principle of law, and might with propriety have been given (*Carlson v. Oregon etc. Ry. Co.*, 21 Or. 450), its refusal was not reversible error. Neither exemplary damages nor damages for the suffering of the deceased or any of his relatives were asked in the complaint, nor, so far as the record indicates, claimed at the trial. The allegations of the complaint and the proof were confined to the earning capacity, habits, and probable length of life of the deceased, and no instructions were given under which the jury could have understood that they had a right to consider ⁴⁸¹ any other matter in arriving at the amount of the verdict. By the instruction as given they were told, in effect, in assessing damages, if they found in favor of the plaintiff, to consider the earning capacity, habits, and probable length of life of the deceased, and thus determine what would probably have been his accumulations if he had lived the ordinary course of his life; and no question is made as to the soundness of this rule. The entire charge of the court as given seems to have been separated into two paragraphs, in some instances without special reference to the context, and objections made and exceptions saved to the giving of each; and while the charge, which was given orally, is, perhaps, open to some criticism on account of the verbal inaccuracy of the language used, to which the attention of the trial court was not specially called at the time, it, however, in our opinion, exhibits no reversible error, but, when taken as a whole, fairly and accurately presents the law as applicable to the facts of this case.

The definition of "negligence" as given is not open to the criticism made, nor did the court withdraw the question of plaintiff's intestate's contributory negligence from the jury, but told them expressly what he had said in regard to the defendant's liability must be taken with the proviso that the plaintiff's intestate did not himself contribute by his own negligence to the injury from which he died, and then proceeded with the charge in detail on that phase of the case. The statement—that the words "care" and "diligence," when used in reference to the duty of the defendant, are not absolute, but relative terms; "that, when the danger is great, the care and vigilance to escape the consequence of danger must be proportionately great. In matters of this sort, where people are dealing with electricity (one of the most ⁴⁸² subtle, powerful, and wonderful agencies known to man; an agency that is very destructive to human life, even when carefully and properly handled and treated), I instruct you that in such a case as this due care would be the highest care and vigilance of which a man is capable, and which the condition of science makes known at the time. And this is the degree of care which was demanded of the company, to so conduct itself in regard to the wires on that bridge as that the diligence and care should be proportionate to the danger which there existed"—is but, in effect, an application to the case in hand of the rule that the care demanded of electric companies must be commensurate with the danger, and that, where their wires are carrying a highly dangerous current of electricity, as is admitted to have been carried over the wires which caused the death of plaintiff's intestate, the law imposes upon the company the utmost degree of care in their construction, inspection, and repair, so as to keep them harmless at places where persons are liable to come in contact with them: *Crowell on Electricity*, sec. 234; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786; *City Electric etc. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262; *Giraudi v. Electric etc. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, and authorities heretofore cited.

The questions in this case are important, and many of them of first impression in this state, and therefore we have given to the case that consideration which its merits deserve; but, finding no error in the record, the judgment must be affirmed, and it is so ordered.

NEGLIGENCE—INSTANTANEOUS DEATH.—Statutes giving a right of action for the death of another are of two classes: 1. Those which provide merely for the survival in favor of the estate or

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designated beneficiaries of the action which the deceased would have had in his own favor had he survived his injuries; and 2. Those which create an entirely new cause of action distinct from any that the deceased might have had had he survived. Under the first class, if death was instantaneous—no period of suffering intervening between his injury and his death—no action would survive. Under the second class, where a new cause of action is created, instantaneous death gives a right of action: Monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 676, 677.

NEGLIGENCE—ACTION FOR DEATH.—At common law, no right of civil action for death was recognized or existed, and such right of action, as it is known to-day, rests purely in statutory enactments: Monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 670.

NEGLIGENCE—ACTION FOR DEATH—STATUTORY CONSTRUCTION.—As to what damages are recoverable in California, where the action is brought by the personal representative, see *Munro v. Pacific Coast etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. See, also, the extended note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375.

ELECTRIC COMPANIES—CARE REQUIRED—DUTY.—A company, or person, using wires to convey electricity is, independent of statutory regulation, required to use very great, if not the highest, degree of care to prevent injury to persons or property: Note to *Snyder v. Wheeling Electrical Co.*, 64 Am. St. Rep. 932; *City etc. Ry. Co. v. Conery*, 61 Ark 881, 54 Am. St. Rep. 262; *Giraudi v. Electric etc. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114.

NEGLIGENCE—CONTRIBUTORY—ELECTRIC WIRES.—One who comes into contact with an electric wire in the necessary and lawful discharge of his duties will not on that account be regarded as guilty of contributory negligence, if it was the duty of the corporation owning such wire to keep it insulated, and it had neglected this duty, and there was nothing in the appearance of the wire to indicate such neglect to the person injured, although he had been cautioned to be careful of the wires and to keep away from them: *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348.

INSTRUCTIONS—REFUSAL TO GIVE—NONPREJUDICIAL.—A refusal to give an instruction which works no prejudice to the party's rights is not error: *Drehman v. Stifel*, 41 Mo. 184, 97 Am. Dec. 268, and note.

INSTRUCTIONS—GENERAL ACCURACY.—The whole of a judge's charge to the jury must be considered together, and where, when so considered, it correctly states the law, it will be upheld, although a particular sentence thereof, if considered by itself, might be open to objection: *State v. Leveille*, 34 S. C. 120, 27 Am. St. Rep. 799.

NEGLIGENCE—WHAT IS.—Negligence is the failure to exercise such care, prudence, and forethought as duty, under the circumstances, requires should be given and exercised: *Brotherton v. Manhattan etc. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709.

JACKSON v. McINNIS.

[88 OREGON, 529.]

NEGOTIABLE INSTRUMENTS—PRESENTMENT.—In order to bind the indorser of a negotiable instrument, the presentment for payment must be made to the person whose duty it is to pay, or to an agent or person duly authorized to act in the premises.

RECEIVERS—PENDENTE LITE—AUTHORITY.—The receiver pendente lite of a corporation is simply an officer of the court, to preserve and distribute the assets of the insolvent corporation, and his powers are limited by his order of appointment and the general equity practice in such cases.

CORPORATIONS — DISSOLUTION — WHEN NOT AFFECTED.—Neither insolvency nor the appointment of a receiver for a corporation amounts to a dissolution, or relieves it from the duty of paying its debts.

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSER—PRESENTMENT.—Presentment for payment to the receiver pendente lite of an insolvent corporation is insufficient to bind an indorser of negotiable paper of which the corporation is maker.

George, Gregory & Duniway, for the appellant.

Spencer & Malarkey, for the respondent.

530 **REAN, J.** This is an action by an indorsee against an indorser of a negotiable certificate of deposit, issued by the Portland Savings Bank on October 26, 1894, in favor of the defendant for three hundred and ninety-nine dollars and seventy-six cents, and by him transferred and indorsed to the plaintiff, for value. After the indorsement, and before the maturity of the instrument, the Portland Savings Bank, becoming insolvent, closed its doors, and a receiver, pendente lite, was appointed by the circuit court of Multnomah county. Upon the maturity of the paper, presentment and demand of payment was made upon the receiver, and notice of nonpayment given to the defendant; and the only question necessary to consider on this appeal is whether such demand and notice is sufficient to hold the indorser. No authority directly in point has been cited by counsel on either side, nor have we been able to find any; but upon principle the demand in question was, in our opinion, insufficient. The contract of an indorser of a negotiable instrument is that if, when duly presented at maturity, the paper is not paid by the maker, he—the indorser—will, upon notice of dishonor, pay the same to the indorsee or other holder. It is a collateral and conditional contract, governed by the technical rules of the law-merchant; and a demand of payment upon the maker or drawer and notice of nonpayment are conditions prece-

dent to the indorser's liability. It would seem necessarily to follow, therefore, from the very nature of the contract, that the presentment for payment must be made to the person whose duty it is to pay, or to an agent or person duly authorized to act in the premises: 1 Daniel on Negotiable Instruments, sec. 588; Tiedeman on Commercial Paper, sec. 313. Now, the receiver pendente lite of a corporation is not the agent of the corporation, nor is it his duty to pay or discharge any of its obligations, except as he may be directed by the court. He is an officer of the court, to preserve and distribute the assets ⁵³¹ of the insolvent corporation, and has no power other than that conferred upon him by the order of his appointment, or such as may be derived from the general practice of the courts of equity in such cases: High on Receivers, sec. 1; Farmers' Loan Co. v. Oregon Pac. R. R. Co., 31 Or. 237, 65 Am. St. Rep. 822. A demand upon him for the payment of the debts of the corporation would, therefore, be a useless proceeding, because he has neither the power nor authority to pay them. That duty still rests upon the corporation, notwithstanding its insolvency and the appointment of a receiver. Neither of these events amounts to a dissolution of the corporation, nor relieves it from the duty of paying its obligations: Bank of Bethel v. Pahquioque Bank, 14 Wall. 383; Decker v. Gardner, 124 N. Y. 334; Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1. It continues to exist as a corporate entity, and its insolvency constitutes no excuse for neglect to make due presentment for payment of its paper, or to give notice of dishonor to an indorser thereof: Hawley v. Jette, 10 Or. 31, 54 Am. Rep. 129.

The case of Armstrong v. Thruston, 11 Md. 148, is quite analogous to the case in hand, and supports the conclusion to which we have arrived. In that case the demand of payment was made upon an assignee of the maker of the note for the benefit of creditors, and it was held that it was not sufficient, because the insolvency of the maker did not excuse demand and notice, and the assignee was not his agent, nor was it his duty to pay the note; and the court say no case has been found in which a demand of payment on a person standing in such a relation to the maker of the note has been held sufficient. The case of Ballard v. Burton, 64 Vt. 387, cited by the defendant, is not in point. That ⁵³² was an action against a person who joined with the bank as maker of a certificate of deposit, and his undertaking was to pay the plaintiff the amount called for by the certificate when it, properly indorsed, should be returned

to the bank. Before its maturity, the bank failed, and the question was whether a return of the certificate to the receiver was a sufficient compliance with the terms of the contract. There was no question in the case as to the rights or liabilities of an indorser, and no discussion or consideration of that question. The same may be said of the case of *Hutchinson v. Crutcher*, 98 Tenn. 421. That was an action against an indorser of a note executed by a third person, payable at a certain bank; and the bank being, at the maturity of the note, in the hands of a receiver, it was held by a divided court that the place of payment was at the office of the receiver, and not at the building formerly occupied by the bank. It follows from these views that the demand for payment made by the plaintiff upon the receiver of the Portland Savings Bank was insufficient to charge the defendant as indorser, and the judgment of the court below must be reversed, and the case remanded for such further proceedings as may be proper, not inconsistent with this opinion.

NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSER—PRESENTMENT.—Where the maker of a promissory note adds to his signature thereto the word "agent," the indorser cannot be made liable on his indorsement thereof without proof of presentment to, and notice of nonpayment by, the person who signed it: *Stinson v. Lee*, 68 Miss. 118, 24 Am. St. Rep. 257. Presentment to the bookkeeper of the drawees of a bill of exchange at the office of the latter was held to be sufficient presentment in *Wesson v. Garrison*, 8 La. Ann. 136, 58 Am. Dec. 674.

RECEIVER OF CORPORATION—PENDENTE LITE.—A receiver of a corporation pendente lite may be appointed by a court of equity under certain circumstances. The receiver, in such a case, is to preserve the assets of the corporation from being wasted and misappropriated: *State v. Second Judicial Dist.*, 15 Mont. 324, 48 Am. St. Rep. 682.

CORPORATIONS—DISSOLUTION—INSOLVENCY.—A corporation is not necessarily dissolved by insolvency: *Germantown etc. Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546. Mere insolvency is never sufficient evidence of the surrender of corporate rights: *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 6 Am. St. Rep. 84.

STATE v. RENICK.

[23 OREGON, 584.]

FALSE PRETENSES—DEFINITION.—A common-law cheat is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest.

FALSE PRETENSES—FALSE PERSONATION—TOKENS. One who, by presenting himself under a fictitious name, and falsely representing himself to be unmarried, procures money from a woman under promise of marriage, does not thereby make of himself a false token, nor render himself liable to punishment under a statute defining the offense of obtaining money or property by false pretenses and requiring, as evidentiary matter to support a charge thereunder, a false token or writing accompanying the pretense.

Charles F. Lord, former district attorney, C. M. Idleman, attorney general, and Russell E. Sewall, district attorney, for the state.

Stott, Boise & Stout, for the respondent.

585 WOLVERTON, C. J. The indictment in this case charges, in substance, that the defendant, George Renick, did, on the tenth day of November, 1896, in Multnomah county, Oregon, willfully and feloniously, with intent to defraud, by means of a certain false token, to wit, himself, the said George Renick, falsely and fraudulently present himself, the said George Renick, and represent and pretend to one Carrie Meyer, an unmarried woman, that he, the said George Renick, was one Charles Smith, that he was unmarried, and competent and in a position to lawfully contract marriage with her, whereas, in truth and in fact, the said George Renick was not Charles Smith, and was not then unmarried, but had a lawful wife then living; by means of which false token, fraudulent pretense, and false representations, coupled with a promise to marry her, the said Carrie Meyer, he, the said George Renick, did then and there obtain of Carrie Meyer divers gold coins, of the value of one hundred and ninety dollars. A demurrer to this indictment was sustained, and the state appeals. It is claimed that the money was obtained by false pretenses, through and by the use of a false token, and that the use by defendant of himself as such false token was sufficient in law to constitute the offense. This presents the only question to be determined.

There was a species of cheat or fraud at common law which was effectuated through the use of deceitful or illegal symbols

or tokens, such as were calculated to affect the public at large, and against which common prudence could not have guarded. It was not sufficient upon which to found the offense if a mere privy token was employed—a counterfeit letter in another person's name, or a private check upon a bank in which the drawer had no funds (*Lara's Case*, 2 Leach, 647, 652), ⁵⁸⁶ and the like—not having the semblance of public authenticity or purporting to be of public consequence, such as spurious money of the realm or bank notes circulating throughout the community as a medium of exchange. But by the Statute of 33 Henry VIII, chapter 1, the obtaining goods by means of false privy tokens, counterfeit letters, et cetera, is expressly made an indictable offense, and this, Mr. Bishop says, has now become common law with us: 1 Bishop's Criminal Law, sec. 571. But, as it regards privy tokens at least, this statute has always been considered as creating a new offense: *People v. Stone*, 9 Wend. 182. Another species of cheat or fraud at common law was accomplished through the false personation of another: 2 Russell on Crimes, 10, 11. Perhaps the commonly accepted definition of a "common-law cheat" is that "it is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest": 1 Bishop's Criminal Law, sec. 571; 2 Wharton's Criminal Law, sec. 1116; 5 Am. & Eng. Ency. of Law, 2d ed., 1025. But Russell, in his work on Crimes, gives it a wider signification, and defines it as "the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public": 2 Russell on Crimes, 613. See, also, 1 Bouvier's Law Dictionary, 317. Under this definition, the cheat need not necessarily be accomplished through the use of a symbol or token, and cases are cited by the learned author, in connection with the definition, which would seem to support his enlarged conception of it. Some cases are cited by Bishop, as *Rex v. Jones*, 1 Leach, 174, wherein an apprentice got himself enlisted as a soldier, and thus obtained a bounty, by professing that there was no impediment; and *Rex v. Hanson*, Sayers, 229, wherein a woman was indicted for getting board ⁵⁸⁷ and lodging by falsely affirming herself to be single and of the name of Fuller, when she was married and of the name of Hanson. And it is supposed by the author that the boy in the one case and the woman in the other were tokens, and therefore that those cases were disposed of upon that ground only. But, when they are looked into, it does

not appear that the decisions were based upon that theory. Indeed, they are so meagerly reported that it is difficult to determine what was the specific ground of their disposal. The broader definition of Russell and Bouvier of a "cheat" at common law would undoubtedly include the offense, as it was in either instance a deceitful practice. In the case of the boy, it was a willful misrepresentation touching his age and apprenticeship; and of the woman, a wrongful personation of another.

There is an old case of *Regina v. Macarty*, 6 Mod. 301, wherein it was charged that Macarty, one of the defendants, falsely represented himself to be a broker, and Fordenborough, the other of such defendants, falsely pretended to be a merchant, of London, and as such traded in Portugal wines, and that, through such pretensions and representations, they induced one Chown to barter a quantity of hats for a quantity of a spurious and unwholesome wine, represented to be a good and wholesome Portugal wine. In deciding the case upon exceptions to the indictment, Holt, C. J., says: "The crime is not the selling one thing for another, but here is a false token, the one pretending to be a broker, and the other a merchant, and a combination to cheat." *Rex v. Govers, Sayers*, 206, is another old case wherein the defendant was indicted for falsely assuming to be a merchant, and producing divers counterfeit commissions purporting to be from Spain, and thereby induced another person to extend him credit. Upon a rule to show cause ^{see} why judgment should not be arrested, Ryder, C. J., said: "The present case is much stronger than that of *Regina v. Macarty*, 6 Mod. 301, inasmuch as the defendant, besides pretending to be a merchant, did produce several paper writings, which he affirmed to be letters containing commissions to him as merchant." Mr. Russell pertinently remarks of the first of these cases that the true ground of the judgment was that it was a case of conspiracy, and this was another species of cheat at common law; and of the second, that the cheat was effected by means of a forgery, which was in itself a substantive offense, indictable at common law. The forgery, if successful, was indictable as a common-law cheat. The broader definition alluded to would include these offenses also, without going to the extent of holding that the defendants themselves were tokens.

But, whatever may be the rule and definition touching the common-law cheat, the statutes of England early began to distinguish between the different species of cheat, and to carve out a distinct offense for obtaining money or property by falsely

personating another. Such an offense has been widely adopted in the American states, and our own statute has made the act punishable: Hill's Annotated Laws, sec. 1776. The statute has also made it an offense for any person to obtain, or attempt to obtain, with intent to defraud, any money or property whatever by any false pretense, or by any privy or false token: Hill's Annotated Laws, sec. 1777. The evidentiary matter necessary to support a charge under the latter section must consist of a false token or writing accompanying the pretense: Hill's Annotated Laws, sec. 1372. Construing the two sections together, the crime known to our statute is much the same as that constituted by 33 Henry VIII, which extended the common-law cheat so as to include one accomplished through the use of a false privy token ⁵⁸⁹ or counterfeit letter. The two offenses are defined, however, and made separate and distinct by statute, so that there need be no longer a question, as under the common law, as to whether, in the false personation of another, the person engaging in the deceit is himself a false token. It is made a crime to so act, and a case coming fairly within the statute, it is thought, could not be prosecuted under the section for obtaining money under false pretenses. The case at bar, however, is probably not a false personation, by reason of the fact that the defendant did not assume to represent a real personage, but only made use of a fictitious name, having no application to any one.

But it is contended that he is guilty of a false pretense by the use of himself as a token. If that were so, he must be regarded as a privy token, as his personation was not calculated, nor was it his purpose, to deceive or impose upon the public in general, the fraud being an imposition upon an individual only, and not extending to the injury of the public, in the sense of a public cheat. In the Jones Case, 1 Leach, 174, the personation was of a class capable of enlistment in the public service, and the act operated as a fraud in the procurement of public moneys. So, in *Rex v. Hanson, Sayers*, 229, the woman obtained general credit by pretending to be unmarried, thus affecting the public. Mr. Wharton puts a case: "If a pretender (e. g., Perkin Warbeck or the Tichborne claimant) palm himself off on a community as another person, and, under the guise of his assumed character, obtain credit from the public at large, he is indictable as a cheat, assuming that he imposes upon persons who have no notice that his claims are disputed, and also addresses his imposture to the public at large. The offense is aimed at the public generally, and is, supposing there is no

notice to put the others on their guard, aimed as much at the ⁵⁹⁰ careful as the careless. Hence it is a cheat at common law." "But suppose," says the learned author, a little farther on, "the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case, there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law": 2 Wharton's Criminal Law, sec. 1124. Thus is characterized the distinguishing feature between a token of public import and a privy token or symbol, and the effect of their use in the consummation of the common-law cheat, and it serves as an admirable aid in determining the nature of the supposed token used in the consummation of the offense charged. If, therefore, in the case at bar, the supposed token is a token at all, it should be termed a privy token.

But is the defendant himself even so much as a privy token? Within the statute of 33 Henry VIII, such a token was taken to denote "a false mark or sign, forged object, counterfeit letter, key ring, et cetera, used to deceive persons, and thereby fraudulently get possession of property": Black's Law Dictionary. See, also, note to Commonwealth v. Speer, 2 Va. Cas. 67. Mere words are neither symbols nor tokens. Hence it has been held that one who obtains a credit by falsely representing himself to be in trade, and keeping a grocery, utters a mere falsehood: Commonwealth v. Warren, 6 Mass. 72. So, if one falsely pretends to another that he has been sent by a third person for money, and obtains it: Regina v. Grantham, 11 Mod. 222; or, in selling a horse he knows to be blind, willfully represents him to be sound: State v. Delyon, 1 Bay, 353; or if he knowingly disposes of wrought gold under ⁵⁹¹ the sterling alloy for gold of standard weight: Rex v. Bower, 1 Cowp. 323. In these and like cases the defendant but utters a naked falsehood, unconfirmed by symbol or token, and was not within the statute of 33 Henry VIII. In the case of Commonwealth v. Warren, 6 Mass. 72, the defendant represented his name to be William Waterman, and that he lived in Salem; and the court said respecting it that, "if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment."

Now, were the representations which the defendant made to the prosecutrix more than wicked falsehoods, under our statute, or may it be affirmed that his presence when uttering the falsehoods was the exhibition of a false privy token, which induced her to part with her money and assisted him in consummating the fraud? It was a matter susceptible of proof and demonstration, upon inquiry, for she was not bound to take his word touching his assertions that he was an unmarried man or that his name was Smith. His physical presence had no tendency to establish the one fact or the other, and was, therefore, not an agent, in the sense of a token or a symbol, in consummating the deception and accomplishing the fraud. He may have been both a liar and the symbol of a liar, but he himself, considered as a token, did not contribute, by reason of his personal appearance, to the deception. By the statutes of England and many states of the Union the element of a false token or symbol is eliminated, and the law is broadly cast that whoever, by any false pretense, obtains money, et cetera, with intent to defraud, shall be guilty of the offense. The case of *Regina v. Jennison*, 9 Cox C. C. 158, is cited, wherein it appears that defendant was indicted for having obtained money from an unmarried ⁵⁹² woman on the false representation that he was a single man, that he would furnish a house with the money, and would then marry her, and it was held that the false representation that he was not a married man was sufficient to support a conviction for false pretenses. But the authority is not in point, as the decision was made under the enlarged English statutes, and the question of a token did not enter into the controversy. Under our statute, the pretense must be accompanied with a false token, and the question presented here is whether defendant was himself a false privy token. We think he was not. He did not attempt to assimilate anything in existence. There was no personal or physical characteristics known to social science whereby an unmarried man may be distinguished from one that is married. So that if a man presents his physical self to another person, and says nothing of his marital state, no one can say whether he at that instant is married or single, from the inspection alone. Testimony must be produced dehors the person from which to determine the fact. If he says that his name is Charles Smith, a fictitious character, and that he was unmarried, when he had a wife living, this is a mere *descriptio personae*, and an inspection of the person will neither corroborate nor detract from the

statement. If he be denominated a "token," and that token is false, it is only made so by the lie he has uttered; his physical existence does not help to establish it. In other words, he has not assimilated anything of real existence whereby the unwary have been deceived. He did utter a wicked falsehood, and this is a false pretense, but the false token is wanting, and therefore the indictment does not charge a crime. It is necessary to specify the false token in the indictment (2 Wharton's Criminal Law, sec. 1129), and this the state ⁵⁰³ has not done. The judgment of the court below will therefore be affirmed.

FALSE PRETENSES—FALSE TOKENS.—To constitute the offense of obtaining goods by false pretenses, it is not generally necessary that any false token should be used, or that the false pretenses should be such that ordinary care and common prudence could not guard against them: *People v. Haynes*, 14 Wend. 546, 23 Am. Dec. 530. See the monographic note to *Barton v. People*, 26 Am. St. Rep. 378. The principal case, or rather the Oregon statute, seems to be peculiar in this respect. For an unusual example of common-law cheating, see *Jones v. State*, 97 Ga. 480, 54 Am. St. Rep. 433.

CASES
IN THE
SUPREME COURT
OF
UTAH.

MALLORY v. KESSLER.

[18 UTAH, 11.]

TRUST DEEDS—SALE UNDER—ACTION FOR DEFICIENCY.—If property is sold under a power in a trust deed, the amount realized at the sale may properly be treated as a payment on the note; and the holder may maintain an action to enforce payment of the balance remaining unpaid and unsecured, although the statute provides that there can be but one action for the enforcement of any right secured by mortgage.

TRUST DEEDS—NOTICE OF SALE—SUFFICIENCY.—A requirement in a trust deed of thirty days' previous notice of sale, to be given by publication in any newspaper, is complied with when such notice is published in a daily newspaper from the 25th of June to the 25th of the following July, both inclusive.

Varian & Varian, for the appellants.

F. Pierce, for the respondent.

13 BARTCH, J. In this case it appears that the defendants borrowed of the plaintiff the sum of six thousand dollars, and evidenced the same by their note secured by a trust deed. Upon failure of payment, the property given as security was sold, under the power in the deed, and the proceeds applied in payment of the note. This left a balance of two thousand two hundred and seventy-four dollars and sixty-seven cents, as a deficiency, to recover which the plaintiff instituted this suit.

Two questions are presented on this appeal: 1. After sale, under a power in a trust deed, can an action at law be maintained for a deficiency? 2. Was the notice of sale sufficient under the terms of the trust deed?

As to the first point, counsel for the appellants contend ¹⁴ that there can be no action for a deficiency, arising after sale, pursuant to a power in a mortgage or trust deed, and rely on section 3460 of the Compiled Laws of 1888. In that section it is provided: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter."

The proceedings of foreclosure are then indicated, and while, under the statute, but one action can be maintained on the original debt secured by mortgage, still we apprehend that it was not the intention of the legislature to prohibit the bringing of an action, on a deficiency, simply because the debt, out of which the deficiency was derived, was so secured. Nor does such intention appear from the context. Because but one action can be maintained to recover a debt secured by mortgage, it does not follow that no action can be maintained to recover a balance due which remains unsecured. The object of the statute doubtless is to compel the mortgagee to exhaust his security before having recourse to the general assets of the debtor. The balance or deficiency, after it has been properly ascertained, whether by sale under a power or by foreclosure in equity, constitutes a subsisting indebtedness as well as did the original debt. In other words, the deficiency constitutes a right in the creditor as against the debtor, and to this right the maxim, *Ubi jus ibi remedium*, is applicable.

We are therefore of the opinion that, in a case like the one at bar, the amount realized by sale under the power may properly be treated as a payment on the note, and that the creditor may, by action at law, enforce payment of the balance remaining unpaid and unsecured: *Jones on Mortgages*, sec. 950; 4 *Kent's Commentaries*, 183; *Blumberg* ¹⁵ v. *Birch*, 99 Cal. 416, 37 Am. St. Rep. 67; *Merced etc. Bank v. Casaccia*, 103 Cal. 641; *Vandewater v. McRae*, 27 Cal. 596; *Shepherd v. May*, 115 U. S. 505.

The second point contended for, by counsel for the appellants, is not tenable. The proof shows that the notice of sale was first published in a newspaper on the twenty-fifth day of June, 1895, and continuously thereafter to and including the twenty-fifth day of July; that the paper was issued in the morning of each day; and that the sale was made at noon on July 25, 1895. The publication of notice was sufficient under the terms of the trust deed, which required "thirty-day previous

notice of sale" to be given "by publication, in any newspaper" before making sale. We discover no error in the record. The judgment is affirmed.

Zane, C. J., and Miner, J., concur.

TRUST DEEDS—SALES UNDER—NOTICE.—For a full treatment of sales and conveyances by trustees under a power of sale contained in the trust deed, including the necessity for and sufficiency of notice given of the sale, see the monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 266-297.

VICTOR GOLD AND SILVER MINING COMPANY v. NATIONAL BANK.

[18 UTAH, 87.]

JUDGMENTS—WHEN APPEALABLE.—A judgment by the lower court that plaintiff's attorneys, who had defrayed the expenses of the appeal and secured a reversal and judgment taxing costs against defendant, had no lien on the judgment for costs, and ordering the costs taxed in pursuance of the mandate of the supreme court, to be offset against other judgments against the plaintiff, is a judgment from which an appeal lies.

ATTORNEY AND CLIENT—LIEN OF ATTORNEY FOR DISBURSEMENTS.—A judgment of the trial court, entered in accordance with the mandate of the supreme court for costs and disbursements by plaintiff's attorneys, because of their client's insolvency, is impressed with a lien in favor of such attorneys, paramount to all claims, and such lien can be discharged or the judgment satisfied only by payment to such attorneys, and cannot be set off against other judgments against their client.

APPEAL—FINDINGS—OPINION.—A finding of facts cannot be disregarded on appeal simply because it was filed subsequently to the rendering of the decision of the court, when, under the statute, the time and order of filing the finding of facts and entry of judgment are merely directory. The opinion of the court in deciding the case, setting forth its reasons for the judgment, is not a finding of facts within the meaning of such statute.

Brown & Henderson, for the appellant.

H. W. Gray, Day & Street, and Booth, Lee & Gray, for the respondents.

*¹ **BARTCH, J.** This case, of the Victor Gold and Silver Mining Company against the National Bank of the Republic, was originally tried in 1895, and judgment entered in favor of the defendant.

It appears that on appealing the case the plaintiff was unable to bear the expenses, and that its attorneys furnished the

money necessary to take the appeal. The appellate court reversed the case, remanded it for a new trial, and adjudged that the appellant should recover its costs to be taxed and have execution therefor. The costs ⁹² were then regularly taxed at two hundred and forty-two dollars and eighty-eight cents, but the clerk refused to issue execution, on the ground that the costs had been offset against two other judgments which had been recovered against the plaintiff. On these judgments the defendant had been served with writs of execution and had paid the officer serving the same two hundred and thirty-five dollars and thirty-nine cents, and then, having paid seven dollars and forty cents to the clerk of the court, made a motion for an order of the court to require the clerk to enter satisfaction of the judgment for costs, so taxed, in pursuance of the mandate of the appellate court. This motion was resisted by Brown & Henderson, for themselves and for the plaintiff, Victor Gold and Silver Mining Company, they presenting affidavits showing that the money had been advanced by the attorneys and belonged to them, and contending that they were entitled to a lien on the judgment. On March 4, 1898, the court sustained the motion holding that the attorneys had no lien on the judgment for costs, and ordered that the costs taxed in favor of the plaintiff be offset against the executions, and that the judgment be satisfied. Thereupon the plaintiff and Brown & Henderson, the attorneys, appealed.

The respondent insists that the decision appealed from was not a final judgment, and therefore not appealable. We do not think this position is well taken. The judgment for costs was entered in pursuance of the mandate of the supreme court. The motion was made to offset these costs and satisfy that judgment. A hearing was had thereon at which affidavits were presented and other evidence introduced, all parties being present, and the cause regularly submitted to, and finally decided by, the court. That decision, as to those costs, and the rights of the plaintiff in the original action and his attorneys, was a final judgment, preventing either of the parties from ever recovering them in any way. The order was made in a ⁹³ matter distinct from the general subject of litigation, and was final in its nature, affecting only the parties to the particular controversy. By that judgment or order the rights of the appellants to the costs were absolutely determined, and, therefore, they had a right to bring the cause to this court for review: Const., art. 8, sec. 9; Williams v. Morgan, 111 U. S. 684; Hovey v. McDonald,

109 U. S. 150; Trustees v. Greenough, 105 U. S. 527; Curtis v. Richards (Idaho, April 6, 1895), 40 Pac. Rep. 57.

It appears that on the 8th of April, 1898, the court filed a finding of facts, and the respondent maintains that it was an additional finding, made at the request of the defeated party, subsequent to the decision, and that therefore this court, on appeal, can consider neither the additional finding nor the evidence on which it was based. This court cannot disregard a finding of facts simply because it was filed subsequent to the rendering of the decision of the court.

Sections 3168 and 3169 of the Revised Statutes, as to the time and order of filing the finding of facts and entry of judgment are directory merely and not mandatory: 5 Ency. of Pl. & Pr. 939; Broad v. Murray, 44 Cal. 228.

Under the statute, however, an express finding of facts is necessary, and, where it contains mere general conclusions instead of facts involved in the issues, and affords no information as to the particular facts considered by the court as established, the court has power after filing the same to correct, amend, or modify the finding, so as to give true expression to the decision of the court, as to the rights of the parties: Bixby v. Bent, 59 Cal. 522; Polhemus v. Carpenter, 42 Cal. 375.

In this case it does not appear that any express finding of facts was filed prior to the filing of the one in question. It is true the court previously filed an opinion, but, while an opinion of a court, in deciding a case, setting forth ²⁴ the reasons for the judgment, may be of great importance on account of the information which it imparts respecting the legal principles which govern the court and should guide the litigants, such opinion is not a finding of facts, within the meaning of the statute, and will not be so regarded. The "decision" which is required to be filed, under section 3168, is an entirely different thing from an "opinion" which a trial court may or may not file as it pleases. The decision of a court is its judgment; the opinion consists of the reasons given for the judgment. In rendering the decision the finding of facts and conclusions of law must be separately stated, and when so stated they form the basis of the judgment or decision: Rev. Stats., sec. 3168; 5 Ency. of Pl. & Pr. 936, 937, and note; McClory v. McClory, 38 Cal. 575.

Under the circumstances shown by the record, we would not be warranted in disregarding the finding in question. It must be considered not as an additional finding of facts, but as the one showing the facts involved in the issues.

The appellants insist that the court erred in holding that the attorneys had no lien on the judgment for costs and disbursements and in ordering that the defendant, National Bank of the Republic, in the original action, had the right to offset other judgments, which had been obtained against the plaintiff, against the judgment for costs. We are of the opinion that this contention is well founded. As we have seen, the judgment for costs was entered pursuant to the mandate of the supreme court, and the appellant in the original case was to have execution for the same. The judgment was made up wholly of costs and disbursements, and these, their client being unable to do so, had been paid by the attorneys, who, it appears, were confident that the case had been erroneously decided by the trial court against their client, and were successful in ^{the} appeal, to prosecute which the costs and disbursements were incurred. Under these circumstances, it is apparent that the attorneys were entitled to be reimbursed for their expenses so incurred and paid, and, the judgment having been entered for such costs, the attorneys had a lien on that judgment paramount to all other claims. Such lien could not be discharged, nor the judgment satisfied, by payment to any other person or persons except the attorneys. Nor could the judgment for costs, under the circumstances, be offset against other judgments which had been obtained against their client. When, therefore, the defendant, National Bank of the Republic, paid the amount of its indebtedness, under the judgment for costs, to other parties having claims against the plaintiff, it made such payment at its peril, and cannot now set them up as a bar to recovery upon the judgment for costs, nor have that judgment offset against other judgments so ill-advisedly paid by it.

In this case the attorneys were not even required to give notice that they claimed a lien, because, the judgment being for costs only, it of itself imparted legal notice of the lien. Such lien rests upon the equity of the claim of an attorney to be reimbursed out of the proceeds of the judgment which he recovered for his client, on account of which the costs have arisen and have entered into the judgment itself. That the lien exists, as to costs and disbursements, is well settled by the weight of authority, and many decisions hold that it exists for compensation for services as well.

In *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572, it was said: "Such a lien existed before the code, and is not affected by any provision of the code. The lien exists not only to the

extent of the costs entered in the judgment, but for any sum which the client agreed his attorney should have ⁹⁶ as a compensation for his services. To the amount of such lien, the attorney is to be deemed an equitable assignee of the judgment. To the extent of the taxed costs entered in the judgment, the judgment itself is legal notice of the lien, and this lien cannot be discharged by payment to anyone but the attorney. The judgment debtor pays these costs to the party at his peril. But if the attorney claims compensation beyond the taxed costs, under some agreement with his client, express or implied, his lien for such compensation can be protected against payment to the client only by notice to the judgment debtor."

In *Currier v. Boston etc. R. R. Co.*, 37 N. H. 223, it was held that an attorney had a lien upon the judgment rendered in favor of his client for the amount of his fees and disbursements in the suit, but that the lien extended only to the fees and disbursements of the attorney on account of the taxable costs.

So in *Stratton v. Hussey*, 62 Me. 286, it was observed: "The attorney need not notify the debtor of his lien. The right of lien is paramount to that of the parties to a setoff of mutual demands. It cannot be defeated by a discharge of the client. It is of the highest equity, and is entitled to the fullest protection."

Mr. Justice Lyon, in *Rice v. Garnhart*, 35 Wis. 282, said: "It cannot be doubted that the attorney has a lien upon the judgment which he has received for his client for his services and disbursements in recovering the same."

The lien of an attorney on a judgment for costs also exists in England: 3 Am. & Eng. Ency. of Law, 2d ed., 447; 2 Kent's Commentaries, 641; Story on Agency, sec. 383; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; *McDonald v. Napier*, 14 Ga. 89; *Weed Sewing Machine Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Carpenter v. Sixth Avenue Ry. Co.*, 1 Am. Law Reg., N. S., 410, 419; *Wells v. Hatch*, 43 N. H. 246; *McGregor v. Comstock*, 28 N. Y. 237; *Ely v. Cooke*, 28 N. Y. 365; *In re Paschal*, 10 Wall. 483; *Henchey v. Chicago*, 41 Ill. 136; *Louisville etc. Ry. Co. v. Wilson*, 138 U. S. 501; *Coughlin v. New York Cent. etc. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Ward v. Craig*, 87 N. Y. 550; *Barker v. St. Quintin*, 12 Maule & S. 440, 451; *Ormerod v. Tate*, 1 East, 464.

We expressly refrain from passing upon the question whether or not an attorney is entitled to a lien upon a judgment ob-

tained by him for his services in obtaining it, because such question is not involved in this case. It must be admitted that the authorities, especially in this country, on the question of an attorney's lien at common law on a judgment, are not harmonious. The cases cited by respondent from California show that the opposite view prevails in that state, and it appears the trial court followed those decisions. We think, however, that the weight of authority accords with the views herein expressed.

We do not deem it important to discuss any other points presented, as the question of lien is decisive of this case.

The case is reversed and remanded, with directions to the court below to set aside its order and decree in the premises, costs to be awarded the appellants.

Zane, C. J., and Miner, J., concur.

JUDGMENTS FROM WHICH AN APPEAL WILL LIE are those which either terminate the action itself or operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term: *Harrison v. Lebanon Waterworks*, 91 Ky. 253, 34 Am. St. Rep. 180. A final judicial determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to that particular controversy, is a final judgment, and may be appealed from: *Mutual Reserve etc. Assn. v. Smith*, 169 Ill. 264, 61 Am. St. Rep. 172.

ATTORNEY AND CLIENT—LIEN OF ATTORNEY.—Where a judgment is recovered for costs only, the judgment debtor is bound to take notice of the lien of the attorney of the judgment creditor thereon, and cannot satisfy the judgment by payment to any one but the attorney: *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572. An attorney has a lien on a judgment or decree obtained by him for his client, to the extent of his fees, or compensation for his services in the cause, which is superior to an equitable setoff afterward acquired by the defendant: *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724.

KAYSVILLE CITY v. ELLISON.

[18 UTAH, 163.]

MUNICIPAL CORPORATIONS—TAXATION.—A municipality has no power to collect a tax upon property or a business so situated that it cannot receive any protection or benefit from it, although such business or property is within the city limits. In such case, there is no compensation for the property taken, and the legislature cannot extend or maintain the limits of a city for such purpose and which has such an effect.

E. B. Critchlow, for the appellant.

Brown & Henderson, for the respondent.

¹⁶⁶ ZANE, C. J. The defendant was charged with violating an ordinance of Kaysville City in doing business as a merchant without obtaining a license, tried before a justice of the peace, and fined in the sum of fifty dollars, from which he appealed to the district court, which found him not guilty, and entered a judgment dismissing the suit. From this judgment the plaintiff has appealed to this court, and assigns it as error.

The limits of Kaysville City, fixed by an act of the ¹⁶⁷ legislature of the late territory of Utah, embraces fourteen thousand two hundred and twenty acres of land. The city, so far as indicated by dwellings, or other buildings, or by streets, alleys, or lots, occupies but comparatively a small portion of the area, and has a population of seven hundred. The defendant's store, where he was doing the business for which he was required to take out the license is situated two miles away. Around this store, the railway station and United States postoffice near by, are a number of dwellings in which four hundred people reside; the place is called Layton. On March 12, 1889, the board of county commissioners of Davis county, in which it is located, adopted a resolution creating Layton precinct, which elected a justice of the peace and a constable.

No part of Layton is platted into blocks or lots nor does Kaysville furnish it police protection or expend any portion of its revenues for its benefit. The lands between Kaysville and Layton for the distance of about two miles are used for grazing or agricultural purposes. The money collected for licenses to merchants, which is in effect a tax upon their business, constitutes a portion of the revenues of Kaysville. The revenue for such taxes, whether upon the business or property of the people of Layton, is appropriated to the use and benefit of the people of Kaysville, and lessens the amount of their taxes. No part of such revenue is appropriated, as it appears from the evidence, for the benefit of the residents of Layton. This brings us to the question, Was Kaysville City authorized to require the defendant to pay the tax in dispute?

In the case of *People v. Daniels*, 6 Utah, 288, the supreme court of the late territory held the assessment and collection of a tax upon a farm situated two miles from Moroni City as indicated by buildings, streets, or other improvements though within its limits as defined by ¹⁶⁸ its charter, when no part of its revenues went to benefit the farm or its occupants, was a violation of the last prohibition of article 5 of the constitution of the United States, as follows: "Nor shall private property be taken for public use without just compensation."

That was a limitation upon the powers of the federal government and, of course, upon the territorial government created by it, but not upon the states, and therefore not upon Utah since statehood, but section 22 of article 1 of the constitution of this state declares that: "Private property shall not be taken or damaged for public use without just compensation." This is a limitation upon the state legislature, and if it embraces all kinds of private property as its language imports, without regard to its nature or form, it includes money, that being a species of property. The right of property in money is as valuable and important as that of real estate, and also requires protection. The real estate of the individual may be taken from him and transferred to the public for its use by condemnation under the right of eminent domain, upon making just compensation, or it may be assessed under the taxing power, seized, sold, and transferred to another, and the money received may be taken by the public and used in paying its officers, in making public improvements, or used for other public purposes. The method differs, but the effect upon the individual's right to his property is the same. By the former process the public gets the use of the individual's real estate; by the latter it gets the use of the money into which the individual's real estate is converted. The owner cannot be deprived of his property by either method without just compensation. By one method he is compensated in money, by the other he receives his compensation in the protection the state or city affords him—in such benefits.

¹⁰⁰ When the land is taken by the public in pursuance of the right of eminent domain, compensation can be determined by the standard of market value, while there is no standard by which the pecuniary value of a just government to the individual can be accurately estimated, but we know its benefits exceed in value the taxes he pays. That value compensates the individual for them. The merchant's business, as in this case, is not appropriated to the use of the public; but the money he pays for the license is.

Undoubtedly Kaysville City has the power to require any merchant doing business within the range of its protection and benefits to pay for a license; but it has no authority to require those doing business outside of such limits to do so, when the sole purpose and effect of a tax upon their property or business is the lessening of the taxes of its people.

A municipality has no power to collect a tax upon property or business situated so that it cannot receive any protection

or benefit from it. In such case there is no compensation for the property taken, though it may be a species of property termed money. And the legislature cannot extend or maintain the limits of a city for such purpose and which has such an effect.

From the evidence the probability is the defendants' business would be more valuable, and the people of Layton would be better off if there was no such city as Kaysville. It may be said that the state has the power to collect a tax upon all the property within its limits, but in such case the state is supposed to give protection to all its people and to benefit all the property within its borders; the same may be said of the county; but in this case the defendant, and others situated as he is, are included in its limits for the sole purpose of benefiting others—their money is given ¹⁷⁰ to others without their consent, without any compensation in municipal benefits or otherwise.

In the case of the People v. Daniels, 6 Utah, 288, after quoting the provisions of the federal constitution, and stating that it applied to that government, and to the territories, but not to the states, it was said: "The government may appropriate the property of the individual when necessary in one of three ways: 1. By taking in the mode prescribed after paying the owner for it; 2. By estimating the benefits to the owner's property from the improvements to be made, and taking the amount estimated in money; 3. By taking the property in the form of money by the methods of taxation for which the benefits of protection and other advantages are furnished by the government. The same principle underlies all these methods. When the property is taken under the right of eminent domain, the public pays the owner in money; when money is exacted by means of a special assessment the owners are compensated in special benefits to their property by public improvements made in its expenditure; and when money is exacted by a general tax, the payer is compensated in the benefits received from the government in any and all of the ways that a government may benefit society."

Later in the same opinion is found the following: "But they also say that the constitutional provision in question has reference to the taking of private property for public use under the right of eminent domain. They concede, however, that taxation and eminent domain rest on the same foundation—the principle of compensation—and that such compensation in case of taxation is in benefits. The constitutional provision in question was designed doubtless to give effect to that principle;

but if the provision simply forbids the taking of private property for public use without just compensation under the right of ¹⁷¹ eminent domain, then its authors made the constitutional rule narrower than the principle upon which they intended to base it, because the principle requires compensation in all cases, whether real estate, money, or any other kind of property is involved; whether it is taken by the methods adopted under the right of eminent domain, or under the right of taxation, or by any other means. The principle lies deeper than mere forms or methods. It would be unreasonable to say that the authors of the provision in question intended to forbid the taking under one right without just compensation, and intended to allow such appropriation under another right; that they intentionally closed one gap, but intentionally left another down by which the same wrong in effect could be accomplished."

The above case was relied upon and followed in *Ellison v. Linford*, 7 Utah, 166. The defendant in the case in hand was plaintiff in that case, and the collector of this plaintiff was the defendant. The following authorities support the conclusions we have reached: *Bradshaw v. Omaha*, 1 Neb. 16; *Morford v. Unger*, 8 Iowa, 82; *Cheaney v. Hooser*, 9 B. Mon. 330; *Covington v. Southgate*, 15 B. Mon. 491; *Arbegust v. Louisville*, 2 Bush, 271; *Sharp v. Dunavan*, 17 B. Mon. 223; *Langworthy v. Dubuque*, 13 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 408; *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627; *Buell v. Ball*, 20 Iowa, 282; *Deeds v. Sanborn*, 26 Iowa, 419; *Deiman v. Fort Madison*, 30 Iowa, 542.

There is a conflict in the authorities which cannot be reconciled; but we are of the opinion those supporting the view we have taken rest upon better reasons.

The judgment is affirmed, with costs to respondent.

Bartch, J., and Miner, J., concur.

MUNICIPAL CORPORATION—TAXATION.—The principal case seems opposed to the weight of authority. In *Cary v. Pekin*, 88 Ill. 154, 30 Am. Rep. 543, it was held that farming lands within a city are subject to municipal taxation, although they are not benefited by the objects for which such taxation is levied. To the same effect is *Kelly v. Pittsburgh*, 85 Pa. St. 170, 27 Am. Rep. 633, and extended note thereto collecting the cases on both sides of the question.

WILLIAMS v. OREGON SHORT LINE RAILROAD CO.

[18 UTAH, 210.]

RAILROAD COMPANIES—NEGLIGENCE—PLEADING.—

In an action to recover for personal injury received through negligence by a railroad company, the plaintiff is not required to aver all of the physical injuries which he sustained, or which may have resulted from or have been aggravated by the wrongful act of the defendant. If such injuries can be traced to the act complained of, or are such as would naturally follow from it, they need not be specifically alleged.

DAMAGES, SPECIAL—PLEADING.—If special damages are claimed, they must be specifically alleged.

RAILROAD COMPANIES—DUTY TO PERSON RIDING ON PASS.—In case of a person riding on a free pass, the carrier is under the same obligations, as to care and vigilance, as he is to a passenger for hire, and as to a passenger to whom a pass is given, based upon any consideration, he cannot absolve himself from liability for injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against public policy and void.

COMMON CARRIERS—RIGHT TO LIMIT LIABILITY FOR NEGLIGENCE.—A common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants. This rule applies to carriers both of goods and passengers, and with special force to the latter.

CARRIERS—LIABILITY FOR NEGLIGENCE TO PERSON RIDING ON PASS.—If a person agrees with a carrier to enter into its employment at a certain place in the future, and, in consideration of the mutual interests of both, a free pass is given to such person to the place of employment, with conditions on the back rendering the carrier nonliable for injuries caused by its negligence, or that of its agents, and, in traveling on such pass to the place of employment, such person is injured by the negligence of the carrier's agents, he must be regarded as a passenger for hire and not an employé, and the carrier is liable for damages caused the passenger by such negligence.

Williams, Van Cott & Sutherland, for the appellant.

C. C. Richards and J. H. & H. R. McMillan, for the respondents.

215 MINER, J. This action was brought to recover damages for personal injuries received by plaintiff while riding as a passenger upon defendant's cars near Malad Bridge, Idaho, on the third day of April, 1897.

216 The complaint charged, in substance, that while plaintiff was riding in defendant's cars as a passenger, the defendant carelessly and negligently operated and ran its train at a great and dangerous rate of speed over and upon a defective

and inadequate railway track, roadbed, and switch maintained by it, and by reason of such negligence and carelessness the train was wrecked, and the plaintiff was thereby greatly and permanently injured, crushed, bruised, and wounded in his back and loins, and in various other parts of his body, both externally and internally, and some of his ribs were broken, and because of said injuries plaintiff became sick, sore, lame, and disordered, and so continued to this day, and he has suffered, and now suffers, thereby great mental and physical pain and distress, and by reason of said injuries he has been rendered unable to follow his usual avocation, and was compelled to lay out and expend fifty dollars for medical treatment, et cetera.

To this complaint the defendant interposed a special demurrer to the effect that it was unintelligible, ambiguous, and uncertain, and that it did not appear what the nature, extent, or kind of injuries, either external or internal, were inflicted, except that some of his ribs were broken, and that the nature and extent of the injury was not set forth. The demurrer was overruled, and the defendant filed its answer denying the allegations of the complaint, and alleged that at the time of the injury plaintiff was not a passenger, but was traveling on a free pass or ticket delivered to plaintiff without consideration.

1. Appellant contends that the court erred in overruling the demurrer. We do not agree with the appellant in this contention. In the case of *Croco v. Oregon etc. Ry. Co.*, ²¹⁷ 18 Utah, 311, this court, in passing upon the same question, said that the plaintiff was not required to aver all the physical injuries which he sustained, or which may have resulted from or been aggravated by the wrongful act complained of. If such injuries can be traced to the act complained of, or are such as to naturally follow from the injury, they need not be specifically averred. When the defendant was informed by the complaint that the plaintiff was permanently injured, crushed, bruised, and wounded in his back and loins, and in various other parts of his body, both externally and internally, some of his ribs broken, and because of such injuries plaintiff became sick, sore, lame, and disordered, and so continued to be, and suffered by reason thereof great mental and physical pain and distress, he was bound to expect evidence of any sickness or any injury to plaintiff's body, both mental and physical, the origin or aggravation of which could be traced to the negligent act complained of.

A complaint alleging negligence and carelessness should spe-

cifically state the acts or omission complained of with reasonable certainty, and show what such negligence or carelessness consisted of, or it will be held bad on special demurrer: *Mangum v. Bullion Beck*, 15 Utah, 534; *Chicago etc. R. R. v. Harwood*, 90 Ill. 425.

But such particularity is not required in stating the injury complained of. It is sufficient on special demurrer if the facts are stated within the rule heretofore laid down. Where, however, special damages are claimed, such damages must be specifically alleged.

In the case of *Croco v. Oregon etc. Ry. Co.*, 18 Utah, 311, above referred to, many cases are cited and the above rule adopted. The fact that a special demurrer was interposed in this case does not change the rule. The allegations ²¹⁸ in this complaint were sufficiently unambiguous and certain to give the defendant notice of the nature and character of the injury complained of. The demurrer was properly overruled.

2. It is also contended that the court erred in denying defendant's challenge to the panel of jurors. The grounds of the challenge were the same as those made in the case of *Kennedy v. Oregon etc. Ry. Co.*, 18 Utah, 325. In that case this court held against the contention of the appellant. The holding in that case is decisive of the question here presented.

3. The plaintiff gave testimony tending to show that in April, 1897, he applied to Mr. Boies, defendant's train master at Pocatello, Idaho, for employment. Boies agreed to give him employment as brakeman if he would go to Glenn's Ferry, Idaho. The plaintiff agreed to go to Glenn's Ferry, and Boies gave him a pass from Pocatello to that place and return. Plaintiff did not ask for the pass. The pass had an indorsement on the back of it. Plaintiff could not say that he read it. It was usual, when a man was employed on a railroad and went to a particular place, to give him a pass to such place. Plaintiff's employment was to begin when he was put to work, and he was to begin work when he arrived at Glenn's Ferry and when placed at work. His time was not going on when the accident occurred. The understanding was that the plaintiff's time would begin when he was actually put to work. While traveling on a free pass in pursuance of the agreement, on defendant's railroad to the place of employment, and when near Malad bridge in Idaho, and before reaching Glenn's Ferry the train was wrecked, and the plaintiff was injured.

The signature of the plaintiff on the back of the pass ²¹⁹ was admitted. The pass was received in evidence. But the following conditions indorsed on the back of the pass were offered in evidence, and on objection, were refused by the court:

"This ticket is not transferable, and it is void if presented by any other than the person named, or if any alteration, addition, or erasure is made upon it. The person accepting and using this ticket, in consideration of receiving the same, voluntarily assumes all risk of accidents and damages, and expressly agrees that the Oregon Short Line Railroad Company shall not be regarded as a common carrier, nor as liable to him for an injury to his person, or any loss or damage to his baggage which may occur while using this ticket, whether caused by the negligence of the company's agents or otherwise. Not good unless signed in ink by the person named on the pass.

"J. A. WILLIAMS."

Among other things, the court instructed the jury as follows: "I charge you that it was the duty of the defendant to use the utmost care and skill which prudent men are ordinarily accustomed to use in keeping its roadbeds, rails, and switch in proper repair, and adequate for the purpose for which they are used; and if you believe from the evidence that such care was not exercised upon the part of the defendant, by reason of which the train upon which the plaintiff was riding became derailed, which caused his injury, then I charge you that you should find a verdict in favor of the plaintiff."

The appellant contends that the court erred in refusing to admit in evidence the conditions on the back of the pass, and in giving the jury the above instruction, requiring the greatest care, as in case of a passenger, and claims that the plaintiff was an employé and not a passenger, and therefore the defendant only owed him the ²²⁰ exercise of ordinary care at the time of the injury, and that the instruction is incorrect, except when the relationship of passenger and carrier exists.

The testimony shows that the plaintiff had agreed to enter the employment of the defendant as a brakeman at such time as he could reach Glenn's Ferry, Idaho. Free transportation, with the conditions attached thereto, was given the plaintiff by the defendant, without request, for the purpose of enabling the plaintiff to reach the agreed place, where the employment would commence. Plaintiff's compensation was not to commence until he reached Glenn's Ferry, and was there given employment on the order given by the yard master. Therefore, the relation of

employé and employer, master and servant, had not yet attached at the time of the injury which occurred at Malad bridge. The intention was to employ and be employed, and the pass was given with that expectation. The transportation of plaintiff to Glenn's Ferry was not a matter of charity or gratuity on the part of the defendant. The free pass was given by virtue of an agreement by which the mutual interests of the parties were considered. The plaintiff desired employment at Glenn's Ferry. The defendant desired plaintiff's services at Glenn's Ferry, and agreed to transport him there free of charge, if he would go there and enter its employment after he arrived there. The plaintiff agreed to this arrangement. The transaction was a mutual benefit to both of the parties, and the pass did not alter it. This was a case where the defendant, as a common carrier of passengers, could not stipulate for the exemption from liability on account of the negligence of his servants. The pass was simply the evidence of a right to be transferred over the road, but not of a contract by which the plaintiff was to assume all the risks, and it would not have been ²²¹ valid if it had been. Under these circumstances it was not important what the back of the pass contained. Plaintiff's acceptance of the pass under the circumstances and conditions would not prevent a recovery. There was a valid consideration for the pass; the plaintiff was a passenger and entitled to that degree of care covered by the instruction. Being such, the defendant had no right to stipulate for the immunity expressed on the back of the pass: *Railway Co. v. Stevens*, 95 U. S. 655; *Railway Co. v. Lockwood*, 17 Wall. 357; 3 Wood on Railroads, 1696; 2 Wood on Railroads, 1203; *Doyle v. Fitchburg R. R. Co.*, 166 Mass. 492, 55 Am. St. Rep. 417; *Denver etc. Co. v. Dwyer*, 20 Colo. 132; *Flint etc. R. R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499; *State v. Western etc. R. R. Co.*, 63 Md. 433; *Gillenwater v. Madison etc. Ry. Co.*, 5 Ind. 339, 61 Am. Dec. 101.

It is argued that even if the ticket was a free pass gratuitously possessed with the conditions printed thereon, still the defendant could not escape liability for its negligence. We believe the plaintiff is correct in this contention. It is held to be the general rule in most of the states that in the case of a person riding on a free pass the carrier is under the same obligations, as to care and vigilance, as he is to a passenger for hire; and as to a passenger to whom a pass is given, based upon any consideration, he cannot absolve himself from liability for injuries resulting from gross negligence, by any notice to that

effect printed upon the pass, as such conditions are held to be against public policy and void: 2 Wood on Railroads, 1208; 3 Wood on Railroads, 1696; Rose v. Des Moines etc. Ry. Co., 39 Iowa, 246; Railway Co. v. Wynn, 88 Tenn. 330; Annas v. Milwaukee etc. R. R. Co., 67 Wis. 46, 58 Am. Rep. 848; Railway Co. v. Lockwood, 17 Wall. 357; Gulf etc. Ry. Co. v. McGown, 65 Tex. 640; Shearman and Redfield on Negligence, sec. 492; State v. Western ²²² etc. R. R. Co., 63 Md. 433; Gillenwater v. Madison etc. Ry. Co., 5 Ind. 339, 61 Am. Dec. 101; O'Donnell v. Allegheny Ry. Co., 50 Pa. St. 490; Hutchinson on Carriers, sec. 566.

In Saunders v. Southern Pac. R. R. Co., 13 Utah, 284, this court held, with reference to a drover's pass, where like conditions were attached, that the holder of the pass was a passenger, and entitled to protection as a passenger on such train, regardless of any clause in the contract exempting the carrier from liability from negligence of its servants, because such clause is against the policy of the law and therefore void. That when the passenger was received the company was liable for any injury which might befall him through the negligence of its servants, the same as though he actually paid his fare before entering the cars, and as to him the company was bound to the exercise of the same care: Hutchinson on Carriers, sec. 550b; Railroad Co. v. Lockwood, 17 Wall. 357.

Speaking of the duties of common carriers, in Railroad Co. v. Lockwood, 17 Wall. 357, the court said: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of due care and ²²³ diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgie or stand out and seek redress in the courts." His business will not admit of such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . .

"It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him."

From a review of the great weight of authority in this country, the general rule, with reference to the liability of common carriers is held to be: 1. "That a common carrier cannot stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law"; 2. "That it is not just and reasonable in the eye of the law for the common carrier to stipulate for exemption from responsibility for the negligence of the master or his servants"; 3. "That these rules apply both to carriers of goods and carriers of passengers, and ²²⁴ with special force to the latter"; 4. "That where a person agrees with a carrier to enter in its employment at a certain place in the future, and in consideration of the mutual interests of both a free pass is given to the place of employment with conditions on the back rendering the carrier nonliable for injuries caused by its negligence, or that of its agents, and in traveling on the defendant's road to the place of employment the person is injured by the negligence of the carrier's agents, such person must be regarded as a passenger for hire and not an employé, and the carrier is liable for damages caused the passenger by its negligence." The conditions printed on the back of the pass were properly rejected. The instructions were not subject to the objection made.

We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

Zane, C. J., and Bartch, J., concur.

DAMAGES—PLEADING.—A general allegation of damages lets in evidence of such damages only as naturally or necessarily resulted from the wrongs charged: *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 378.

DAMAGES.—**SPECIAL** damages, to be recovered, must be specially pleaded: *Chicago etc. R. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602.

CARRIERS—DUTY TO PERSON RIDING ON PASS.—So far as concerns a carrier's liability for negligence, a person riding on a free pass is a passenger, and the carrier is answerable to him to the same extent as he is to those who pay full fare, because the carrier has no power to exempt himself, by special contract, from the consequences of his own negligence, or the negligence of his employes: *Monographic note to Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 88. The carrier is equally liable to an employé riding on a free pass, where the free transportation is given as a part of the consideration for the services rendered by such employé: *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721.

CARRIERS—RIGHT TO LIMIT LIABILITY FOR NEGLIGENCE.—Contracts of carriers, based upon a valuable consideration, limiting their common-law liability, are valid, but cannot exempt from liability for negligence: *Berry v. West Virginia etc. R. R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781; *Bird v. Railroads*, 99 Tenn. 719, 63 Am. St. Rep. 856.

LISONBEE v. MONROE IRRIGATING COMPANY.

[18 UTAH, 842.]

WATERS AND WATERCOURSES—CARE REQUIRED IN IRRIGATION.—Canal companies are required to use reasonable skill, judgment, and care in the construction of their ditches used for irrigation purposes, and in their maintenance and repair, and like skill, judgment, and care is imposed upon the proprietors of irrigated lands in the use and control of irrigating water. If such water flows upon the surface of irrigated lands adjoining lands of another, to his injury, the person whose negligence causes or permits it must respond in damages. When the lower land becomes soaked and too wet from infiltration and percolation from irrigated land, and is thereby damaged, the upper proprietor cannot be held liable when he irrigates his land with reasonable care, using no more water than is reasonably necessary in so doing.

WATERS AND WATERCOURSES—IRRIGATION—DISPOSITION OF SURPLUS WATER—NEGLIGENCE.—Irrigation companies should conduct their surplus waters in suitable ditches to the source of supply, or otherwise control them, so that they may not injure the property of others, and a canal irrigating company, whose surplus ditch is inadequate and improperly maintained, is liable in damages to one who is injured by the water escaping therefrom.

WATERS AND WATERCOURSES — IRRIGATION—CARE REQUIRED.—Irrigation companies in the care of their waters are required only to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature, and

are not required to prepare to meet unlooked-for and overwhelming displays of adverse power, such as storms of such unusual violence as to surprise cautious and reasonable men.

EVIDENCE—PRODUCTION OF WITNESSES.—If counsel offers to prove certain facts, the court may require that the witnesses be sworn and put upon the stand, so that the admission of questions and answers may be ruled upon.

Stewart & Collins, for the appellant.

J. B. Jennings, for the respondent.

³⁴⁶ ZANE, C. J. The plaintiff alleged in his complaint he was the owner of fifty-six acres of land situated below defendant's canals and lands irrigated from them; that they owned and controlled a certain ditch through which they carried surplus and waste water from off lands irrigated by them to the Sevier river, the source of supply; that such ditch extended through plaintiff's land and had been improperly constructed and was negligently maintained; that in consequence of such defective construction and want of repair the drainage from the higher land irrigated from defendant's canals was collected, and caused to flood a portion of plaintiff's land, washing it away and rendering it unproductive. In his complaint, the plaintiff also declared upon another cause of action similar to the one above set forth, and concluded with a prayer for judgment for five hundred and seventy-five dollars, and for a writ of injunction restraining the defendants from so maintaining their surplus ditch as to injure his property.

³⁴⁷ The defendants answered denying the improper construction of the ditch, negligence in maintaining it, or that they caused plaintiff's land, or any part of it to overflow, or that any water escaped from their surplus ditch on to it to plaintiff's injury.

Defendants had the right to conduct water through their ditches and to deliver so much as was necessary for the irrigation of the lands of their stockholders or other persons, and if, in consequence of improper and negligent irrigation, the proprietors of such lands allowed it to escape onto the lands of other persons to their injury, such proprietors would be liable to such other persons for such negligence, and not the canal companies without fault. The law requires canal companies to use reasonable skill, judgment, and care in the construction of their ditches and in their maintenance and repair, and imposes upon proprietors of irrigated lands like skill, judgment, and care in the use and control of irrigating water. If such water

flows upon the surface of irrigated lands onto adjoining lands of another, to his injury, the person whose negligence causes or permits it must respond in damages. When the lower land becomes soaked and too wet from infiltration and percolation from irrigated land, and is thereby injured and damaged, we are not disposed to hold that the upper proprietor can be held liable when he irrigates his land with reasonable care, using no more water than is reasonably necessary in so doing.

Undoubtedly, canal companies and other persons should conduct their surplus waters, or waters they may allow to go to waste in suitable ditches to the source of supply when practicable, or to otherwise control them so they will not injure the property of other persons. Judgment, reasonable skill, and care should be used in constructing and maintaining surplus or drain ditches; such ditches ³⁴⁸ should be adequate and suitable to carry such surplus or other water allowed to collect in them so that it may not escape onto the adjoining lands of other persons to their injury, and they should be kept so by necessary repairs, and such ditches should be so constructed as not to obstruct the natural flow of surface or other water to the injury of the lands or crops of other people: *North Point etc. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607.

Water controlled by gravitation manifests a power familiar to all, capable of accomplishing useful and beneficial purposes or destructive and disastrous consequences and results, and therefore when individuals interfere with or undertake to control such a force as an agency for their own purposes, by the employment of dams, canals, or machinery, the law requires them to use judgment, skill, care, and caution in the construction and maintenance of such means and appliances, in order that their neighbors or other people may not be injured. But they are only required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature; they are not required to prepare to meet unlooked for and overwhelming displays of adverse power, such as storms of such unusual violence as to surprise cautious and reasonable men: *Jordan v. Mount Pleasant*, 15 Utah, 449.

We deem this explicit statement of the rights and obligations of persons controlling and using water for their own purposes under the conditions mentioned, because a clear understanding of such rights and duties is necessary to an intelligent and just disposition of this case.

It appears from the record that this case was tried by the

court below sitting as chancellor; that a jury was called to try the issues as to damages; that they found the ³⁴⁰ issues for the defendants; that the court regarded the verdict as advisory simply, and made findings of fact upon the evidence, stated conclusions of law, and entered a decree denying the injunction asked, adjudging the issues as to damages against the plaintiff, and costs to defendants. The court stated in its findings "that the ditch was not negligently constructed or maintained," and the plaintiff assigns this as error.

The defendants having used and controlled the ditch to carry surplus and waste water to the Sevier river, they should have given it sufficient capacity to hold all water that might be reasonably expected to accumulate in it, and they should have enlarged and repaired it from time to time as experience, observation, and safety might indicate.

It appears that a flume of the Annabella Canal Company obstructed it in part for a time and at times caused it to overflow its banks; this the defendants should have removed or avoided without unreasonable delay; and it also appears that Buttleson's dam in Monroe canyon broke, and its waters ran over plaintiff's land. This, of course, defendants were not responsible for; but breaches in the banks of the ditch were allowed to remain an unreasonable length of time, through which its waters flowed onto plaintiff's land, and the decided weight of evidence shows that the ditch in places was inadequate to hold all the water that was allowed to accumulate in it, in the absence of extraordinary and overwhelming emergencies. Of course, waters from rains within the scope of reasonable expectation will at times be added to those from irrigation, and swell the volume. Such contingencies the defendants were bound to anticipate in the course of nature.

How much damage to plaintiff's land was caused by the waters of the ditch, in the absence of extraordinary and ³⁵⁰ surprising emergencies, it is difficult to ascertain from the evidence. It clearly appears from the decided weight of it there was some. Without specifying the evidence that proves this with more particularity, we are clearly of the opinion that the defendants did not use such judgment, diligence, and care in the construction and repair of the surplus ditch in question, as the law required them to do, and we hold that the above finding was erroneous.

For similar reasons portions of the sixth, seventh, and eighth findings of fact must be held to be erroneous. Counsel for

plaintiff made offers to prove certain facts, but the court required them to have the witnesses sworn to put them upon the stand, so that the admission of questions and answer might be ruled upon. Counsel refused to do so and the offers were rejected. This ruling of the court is also assigned as error. We hold that the court was right.

It appears from the record that the trial was attended with unusual irritation and discord; that the language and manner of one of plaintiff's attorneys toward the court on the trial, and other language of the same attorney out of the hearing of the court, but afterward brought to his ears, was regarded as contemptuous, and at different times during the trial the court used language toward the attorney, which, being in the hearing of the jury, he alleged was prejudicial to his client's case, and for that reason he excepted to it, and assigns it as error.

The court has the right to maintain its dignity and reprove or rebuke counsel for language and conduct tending to bring it into contempt, or in a proper case to punish by fine, and, in some cases, imprisonment. Counsel should be respectful, and the court should preside with dignity and propriety. Counsel also have rights which the court should at all times respect.

³⁵¹ In view of the record, we are disposed to hold that the language excepted to was not prejudicial error. Numerous other errors are assigned which we have considered, but do not deem it necessary to extend this opinion by a special examination of them.

The judgment is reversed, with directions to the court below to grant a new trial. Costs of appeal awarded to plaintiff.

Bartch, J., and Miner, J., concur.

WATERS—DUTY TO CONTROL—IRRIGATION.—A canal company which diverts water from a stream for the purpose of irrigation must, under the statutes of Utah, control the seepage and surplus water from lands irrigated by it so as not to injuriously affect the rights of others: *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246. 67 Am. St. Rep. 607. The owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will not be the means of injuring another, either above or below, by throwing the water back, or being incapable of resisting it in times of usual, ordinary, and expected floods; but his liability extends no further, and he is not held responsible for inevitable accidents, or for injuries occasioned by extraordinary freshets which could not be anticipated or guarded against: *Note to Hunter v. Pelham Mills*, 68 Am. St. Rep. 912. At common law, under some circumstances, one who brought large quantities of water on his land was held liable if it escaped and caused damage, irrespective of his negligence, upon the principle that one who brings anything on his land which, if it should escape, may cause damage to his neighbor, does so at his peril: *Note to St. Peter v. Denison*, 17 Am. Rep. 263.

STEED v. HARVEY.

[18 UTAH, 367.]

CONSTITUTIONAL LAW—PLACE OF TRIAL.—A state constitutional provision that "all civil and criminal business arising in any county must be tried in such county, unless a change of venue is taken in such cases as may be provided by law," applies only to causes of action arising within the jurisdiction of the state.

CONSTITUTIONAL LAW—RIGHTS OF CITIZENS OF OTHER STATES.—The provision of the federal constitution that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states" gives a citizen of a state the right to maintain an action to recover a legal demand or equitable right against a person found in a state of which he is not a citizen.

CONSTITUTIONAL LAW—CITIZENS OF ONE STATE HAVE IN OTHER STATES the same rights and remedies in relation to the maintenance of actions as the citizens thereof.

CONSTITUTIONAL LAW—EQUAL PROTECTION.—The federal constitution, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws," secures to every person within the jurisdiction of the state, whether a citizen or resident or not, the protection of its laws equally with its own citizens. This protection means protection to life, liberty, and property; and property means and includes money due for the violation of a contract.

TRIAL—PLACE OF AS TO PERSONAL ACTION ARISING IN ANOTHER STATE.—If a transitory cause of action arises in another state, the plaintiff has the right, in the absence of statute fixing the place of trial, to bring his suit in any county in the state where he may be, and where he finds the defendant, and in which the court may obtain jurisdiction of the defendant by service of process or by appearance. The rule is the same though one or both of the parties are nonresidents.

CONSTITUTIONAL LAW—STATUTES VOID IN PART.—One of two or more provisions of the same section of a statute, not dependent on each other, may be held void, and another, or the others, be held valid, but the same provision or section cannot be held both void and valid.

CONTRACTS—PAROL EVIDENCE TO EXPLAIN.—Parol evidence is admissible to explain a mere memorandum of a written contract.

PLEADING.—DEFENSE OF STATUTE OF FRAUDS may be relied upon, though not pleaded in reply to a counterclaim, under a statute providing that "the statement of any new matter in the answer in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

F. S. and J. T. Richards, for the appellant.

D. Evans and A. G. Hern, for the respondent.

371 ZANE, C. J. The plaintiff commenced this action in the district court of Weber county, to recover three thousand nine hundred and fifty dollars damages in consequence of the

failure of the defendant to deliver certain cattle at Green river, in the state of Wyoming, as required by a contract made in the state of Idaho. The defendant appeared by his attorneys and answered the complaint, admitting the contract set up in the complaint, and the breach thereof, and the amount due, except fifty dollars, which he also admitted on the trial.

The defendant insists that the cause of action did not arise in Weber county, and that the trial of the case there was erroneous.

The following provision of section 5, article 8, of the constitution is referred to: "All civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken, in such cases as may be provided by law."

This provision applies only to causes of action arising within the jurisdiction of the state of Utah. In what county of Wyoming a cause of action arising in that state ³⁷² shall be tried cannot be determined by the constitution or laws of Utah. The venue of causes for trial in Wyoming can only be determined by its laws. The contract upon which the plaintiff relies was made in the state of Idaho. The breach for which damages are claimed occurred in Wyoming, and the action for their recovery was commenced in Weber county, Utah, and there the defendant answered, and where he resided is not otherwise shown.

This action is personal, not real, transitory, not local. Plaintiff's right accrued under the laws of Wyoming, and was not suspended or lost when defendant came to Utah. Whether the right and obligation were fixed by the common or statute law is immaterial. When the plaintiff found the defendant in Utah he had the same right to employ the legal remedies its laws afforded that its own citizens had. Any resident of the state of Utah having a just demand against defendant could sue him, when found within its limits. Section 2, article 4, of the constitution of the United States, declares that: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

This is a general description of the rights guaranteed by the constitution of the United States to the citizens of each state in the several states, under their laws respectively, without enumerating them. Undoubtedly, a citizen of a state may acquire and claim rights under the laws of another state without going into it. He may enter into contracts to be executed in another state, and may acquire and own property, personal and

real, situated therein, by purchase, bequest, or inheritance; and he may engage in lawful commerce, trade, and business therein, and such property is exempt from any higher taxes than are imposed by the state on its own citizens, and he has a right to employ the remedies the laws of such state provide ³⁷³ for the enforcement of his contracts, the redress of wrongs, and the protection of his rights; he is entitled to the same protection of life, liberty, and property the laws of such state extend to its own citizens. The privileges and immunities of a citizen of one state in another state includes these rights with others. There are privileges, however, which states give only to their own citizens, rights which they will not permit citizens of other states to acquire and possess, such as the elective franchise, the right to sit upon juries, the right to hold public office. These rights they make dependent on citizenship.

If a sovereignty were to intrust the elective franchise to the citizens of another state only in part, it would not rest upon the will of its own citizens; or if a state were to permit its offices to be filled and their functions to be exercised by citizens of other states, its citizens, to that extent, would not enjoy the right of self-government. Such rights and privileges are not contemplated by the words "privileges and immunities" used in the constitutional provision above quoted. Undoubtedly, this provision of the constitution gives a citizen of a state the right to maintain an action to recover a legal demand or equitable right against a person found in a state of which he is not a citizen. Further, the last clause of section 1, article 14, of the same constitution declares that no state shall "deny to any person within its jurisdiction the legal protection of the laws." This provision forbids the state from denying to any person within its jurisdiction the equal protection of its laws. It secures to any person within its jurisdiction, though he may not be a citizen or even a resident, the protection of its laws equally with its own citizens, and this protection must be construed to mean protection to life, liberty, and property, and the term "property" must ³⁷⁴ be held to include money due for the violation of a contract.

To refuse the plaintiff, though not a citizen of this state, the right to maintain this action against the defendant found within its limits, would be to deny to him the equal protection of the law. We are of the opinion that the respective constitutional provisions gave to plaintiff the right to institute and maintain this action: *Ward v. Maryland*, 12 Wall. 418; *Strauder v. West*

Virginia, 100 U. S. 303; *Denick v. Railroad Co.*, 103 U. S. 11; *Brown on Jurisdiction*, sec. 39.

In *Ward v. Maryland*, 12 Wall. 418, the court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

This language is found in *Strauder v. West Virginia*, 100 U. S. 303: "The fourteenth amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among ³⁷⁵ which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the constitution."

As we have seen, the constitutional provision of Utah, quoted, requiring all causes of action to be tried in the county in which they arise has no application to those arising outside of the state, and therefore beyond its jurisdiction. The state can have no power to require causes of action so arising to be tried in the county in which they arise, and to deny the plaintiff the right to maintain his suit for the reason that the cause did not arise in any county of the state would be a violation of the constitution of the United States as we have seen.

It does not satisfactorily appear from the record whether the parties to this action were residents of this state. It does appear, however, that the cause of action arose and accrued in the state of Wyoming, and the question arises, In what county should a suit upon such a cause of action be tried?

After certain other sections, naming the place of trial of certain actions not including the class to which this one belongs, section 3196 of the Compiled Laws of 1888, declares: "In all other cases the action must be tried in the judicial district in which the defendants, or some of them, reside at the commence-

ment of the action; or if none of the defendants reside in the territory . . . the same may be tried in any judicial district the plaintiff may designate in his complaint."

This court declared both of these provisions unconstitutional and void in the case of *Konold v. Rio Grande etc. Ry. Co.*, 16 Utah, 151.

That was a cause of action arising in this state, and it is urged that it does not follow they are void as to actions ³⁷⁶ upon causes arising outside of the state. The affirmance of that proposition would require us to hold that the same provision of law may be void as to actions upon causes arising in the state, and valid as to those arising outside—that they may be valid and void at the same time.

One of two or more provisions of the same section not dependent on each other may be held void, and another or the others be held valid; but the same provision cannot be held void and valid.

We find no statute in force designating the place of trial of actions in this state upon causes of action arising outside of it.

This cause being transitory, in the absence of a statute fixing the place of trial, the plaintiff had the right to bring his suit in any county in which he might find the defendant, and in which the district court might obtain jurisdiction of the defendant by service or appearance. The defendant having appeared and answered, we cannot hold that the court did not have jurisdiction to try the case: *Dennick v. Railroad Co.*, 103 U. S. 11; *Brown on Jurisdiction*, sec. 11, 39; 12 Am. & Eng. Ency. of Law, sec. 201; *McKenna v. Fisk*, 1 How. 241.

The defendant filed a counterclaim, in which he alleged plaintiff contracted to deliver him four thousand wethers at a price named, and a breach thereof by which defendant further alleged he had lost six thousand dollars. On the trial the defendant introduced a check signed and paid by him on the Union Stock Yards National Bank for one thousand dollars, payable to the order of plaintiff and indorsed by him. On its back was indorsed: "2-12, 1897. This is to certify that I have received this check as part payment of 4,000 wethers more or less to be delivered at Green river, on or before Feb. 25, and to finish payment for same when delivered, at the rate of \$2.25 per head." The plaintiff's name indorsed ³⁷⁷ on the back of the check, it was claimed, should be regarded as an execution by him of the above certificate, and that it should be held as a written contract between the parties, and therefore could not

be varied by oral testimony. While the plaintiff claimed that it was simply a memorandum showing the check was given for sheep purchased in pursuance of a letter of credit for such purchases. Appellant assigns as error the ruling of the court permitting certain questions to elicit evidence of the purpose of the indorsement. This we are of the opinion was not erroneous. Nor do we think the court erred in admitting oral evidence tending to show the writing on the back of the check was simply a memorandum of the payee and did not include the entire contract, and tending to prove it; that there were other conditions and provisions not embraced in the memorandum, and that it was not in fact the contract between the parties: 1 Thompson on Trials, 1118.

The rulings of the court admitting other questions are assigned as error. While some of the questions are open to criticism, the ruling does not amount to reversible error.

The defendant in his answer stated other new matter constituting a counterclaim. He claimed damages for the failure to deliver another flock of sheep according to a verbal contract, which the evidence showed was within the statute of frauds. The defendant urges that the plaintiff could not rely upon the statute of frauds because that defense was not alleged in a reply to the counterclaim.

Section 2980 of the Revised Statutes of 1898 requires a reply to new matter in an answer or otherwise amounting to a counterclaim; but the judgment appealed from was rendered before that section took effect and while section 3248 of the Compiled Laws of 1888 was in force declaring: "The statement of any new matter ³⁷⁸ in the answer in avoidance or constituting a defense or counterclaim must on the trial be deemed controverted by the opposite party": Whitney v. Richards, 17 Utah, 226; Sterling v. Smith, 97 Cal. 343; Colton Land etc. Co. v. Raynor, 57 Cal. 588.

We find no reversible error in the record. The judgment is affirmed, with costs to respondent.

Bartch, J., and Miner, J., concur.

TRIAL-PLACE OF.—Transitory actions may be prosecuted wherever the defendant may be found, although the subject matter thereof may have occurred in another state, and be regulated by the laws of that state: Hale v. Laurence, 21 N. J. L. 714, 47 Am. Dec. 190. The personal privilege which a defendant has of having an action against him tried in the county in which he resides may be waived by him: Raney v. McRae, 14 Ga. 589, 60 Am. Dec. 660.

CONSTITUTIONAL LAW—PLACE OF TRIAL.—The right to go into another state and to sue in its courts upon a cause of action arising in favor of the plaintiff in the state of his residence is a privilege guaranteed to him by section 2 of article 4 of the constitution of the United States: *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, and extended note thereto.

CONSTITUTIONAL LAW—STATUTE VOID IN PART.—Though a part of a statute is unconstitutional, the remainder will not be declared to be unconstitutional also, if the two are distinct and separable, so that the latter may stand though the former becomes of no effect: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315; *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653.

CONTRACTS.—PAROL EVIDENCE of other and oral stipulations may be received, when some of the stipulations of a contract are in writing, where the writing, or writings, by reason of their brevity, informality, and skeleton nature, do not of themselves imply that all the stipulations of the parties with reference to the subject matter were intended to be expressed in them, and when the particular stipulation is of such a nature that the omission to express it in the writing does not indicate that it was not agreed upon, and it in no way conflicts with the written stipulation, and does not increase the burden of either party: *Gould v. Boston Excelsior Co.*, 91 Me. 214, 64 Am. St. Rep. 221. See the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 661.

PLEADING—DEFENSE OF THE STATUTE OF FRAUDS.—The general rule is that the statute of frauds must be specially pleaded as a defense, and cannot be relied upon under the general issue. If it is not pleaded the defense is waived: Note to *Robertson v. Smith*, 64 Am. St. Rep. 726; *Draper v. Macon Dry Goods Co.*, 108 Ga. 661, 68 Am. St. Rep. 136. This rule does not prevail in some of the states: See *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; and there are limitations upon its application, as illustrated by the principal case.

BEARDSLEY v. MORRISON.

[18 UTAH, 478.]

LANDLORD AND TENANT—COVENANT FOR IMPROVEMENTS.—If a lease contains a covenant binding the landlord to make certain improvements and repairs, and he refuses to make them after notice from the tenant, the latter may make them in accordance with the covenant and charge the reasonable value thereof against the rent. In such case, the purchase of lumber and placing it upon the premises by the tenant, with the intention on his part of making the improvements as provided in the lease, constitutes a sufficient payment of the rent to prevent a forfeiture of the lease.

VERDICT.—IN CASES AT LAW, THE VERDICT OF THE JURY IS CONCLUSIVE, if there is any evidence to support it.

ACTIONS—PLEAS IN ABATEMENT.—If a party pleads a former suit pending, in abatement of a second suit, he must allege clearly that the cause of action of the first is identical with that of the second suit; otherwise, his plea is insufficient.

J. M. Bowman, for the appellant.

Dey & Street and W. H. Bramel, for the respondent.

⁴⁸⁰ BARTCH, C. J. This action was brought to recover damages for unlawful and forcible ouster and for consequential damages. It appears that the defendant, Kinney, owner of certain premises, known as the Everett Hotel, on September 11, 1893, leased the same to the plaintiff for one year from October 1, 1893, with the privilege on the part of the lessee to extend the lease for two years from October 1, 1894. By the terms of the lease, the lessee was to pay twenty-five dollars per month up to January 1, 1894, and fifty dollars per month thereafter. It was also provided in the lease that the lessor, within thirty days after written notice from the lessee so to do, should finish a certain addition to the hotel according to certain designated plans and that upon the completion of the addition the rent should be seventy-five dollars per month. Under the terms of the lease, all rents were to be paid to defendant Morrison, and the instrument ⁴⁸¹ contained a clause for re-entry into possession by the lessor, and sale of the effects of the lessee in case the rent was not paid as provided by the terms of the lease. The rent was payable in advance on the tenth day of each month, and delinquent in thirty days thereafter.

From the evidence it appears that the lessee took possession of the premises, and in January, 1894, the lessor assigned the lease to defendant Morrison. After January 1, 1894, the lessee elected to extend the lease as provided therein, and in February of the same year served notice in writing upon the lessor and his assignee to complete the addition to the hotel, but the addition was not completed. It appears the lessee paid the rent regularly to defendant Morrison, except for the month of May, which became due May 10th, and, if not paid, delinquent on June 10, 1894. Instead of paying the rent for that month to Morrison, the lessee purchased lumber for the amount thereof, and hauled it to the premises for the purpose of completing the addition himself. On June 11, 1894, defendant Morrison forcibly ejected the lessee and took possession of the premises, including furniture and fixtures. Such are the material facts, so far as we are able to glean them from the very imperfect record filed in this case.

At the trial the jury returned a verdict in favor of the plaintiff in the sum of four hundred and seventy-two dollars and twenty-seven cents, and, upon judgment having been entered thereon, this appeal was prosecuted.

The first contention of appellant which we will notice is that the rent was not paid for the month of May, 1894, as required under the terms of the contract, and that therefore respondent Morrison was authorized to take possession of the premises and declare a forfeiture of the lease. Under the terms of the lease, the lessor was bound to ⁴⁸² build or complete the addition to the hotel, upon receiving thirty days' written notice to do so from the lessee. Such notice was given, but neither the lessor nor the assignee performed this part of the contract by finishing the addition. Their failure to do so gave the lessee the right to make the addition tenantable in accordance with the terms of the lease, and set off the expense against the rent. The assignee was mentioned in the instrument as the party to receive the rent, was aware of the terms of the contract, which he assumed, and is therefore in no better plight than the lessor himself. The making of the improvements having been refused by the landlord after notice from the tenant, the purchase of the lumber and placing of the same upon the premises, with the intention, on the part of the tenant, to make the improvements, as provided in the contract, constituted a sufficient payment of the rent for the month of May, 1894, to prevent a forfeiture of the lease, the lumber amounting in value to the rent, and therefore the tenant was not in default, and the assignee had no right to forcibly oust him of possession. Where a lease of premises contains a covenant binding the lessor to make certain improvements and repairs, and the lessor refuses to make such improvements and repairs, after notice from the lessee to do so, the lessee may make the same in accordance with the covenant, and charge the reasonable value thereof against the rent: 12 Am. & Eng. Ency. of Law, 724-726, 748, 1005; Hexter v. Knox, 63 N. Y. 561; Myers v. Burns, 35 N. Y. 269; Cook v. Soule, 56 N. Y. 420; Ecke v. Fetzer, 65 Wis. 55; Orton v. Noonan, 30 Wis. 611; Wolfe v. Arrott, 109 Pa. St. 473; Buck v. Rodgers, 39 Ind. 222; Wright v. Lattin, 38 Ill. 293.

Appellant's contention that the lessee's agent voluntarily surrendered possession to the assignee is not well taken. ⁴⁸³ There is evidence to show that, upon being refused possession by the agent, the assignee broke a window and a piece off from the door, and then, being enabled to open the door, took possession of the premises, and that an employé of the assignee forcibly ejected the agent from the house.

It is clear from the evidence that the taking of possession by the assignee was forcible, and, under the circumstances, unlaw-

ful. But this being a case at law, even if we thought otherwise, still, as to this point, the verdict of the jury would be conclusive, since there is evidence in support of it.

Nor do we think the court erred in refusing to admit in evidence the files in case No. 13,726. There is no plea which warrants the admission of those files. The answer simply alleges, "that the plaintiff has an action pending in the third district court against this defendant for the purpose of recovering the possession of said premises." This allegation shows that the action pending and referred to was one for the recovery of possession of the premises—an action of ejectment—while this action is one for damages. The two actions are not founded upon the same cause of action, and therefore the former will not authorize the abatement of the latter. Where a party pleads a former suit pending in abatement of a second suit, he should allege clearly that the cause of action of the first is identical with that of the second—that the same matters are in issue in both suits: *Wilson v. St. Paul etc. Ry. Co.*, 44 Minn. 445; *Vance v. Olinger*, 27 Cal. 358; *Larco v. Clements*, 36 Cal. 132.

We have considered the other questions presented and have found no ground for reversing the judgment.

It is therefore affirmed with costs.

Baskin, J., and McCarty, D. J., concur.

LANDLORD AND TENANT—COVENANT TO REPAIR.—Where a landlord covenants to make repairs, and unreasonably neglects to make them after notice to do so, the tenant may make them and charge the expense to the landlord: *Extended note to Polack v. Pioche*, 95 Am. Dec. 120.

THE VERDICT OF A JURY will not be disturbed, on appeal, where the evidence is conflicting, if there is some evidence to support it: *Frankfort v. Coleman*, 19 Ind. App. 368, 65 Am. St. Rep. 412.

ABATEMENT—PLEA IN.—To sustain a plea of a former action pending, it must appear from the pleadings in the first action that it was for the same cause as the second, or necessarily involved the same question. It is not enough that the same property is in controversy in both actions: *Mandeville v. Avery*, 124 N. Y. 376, 21 Am. St. Rep. 678. The identity of the subject matter and of the parties must be alleged: *State v. Boyce*, 72 Md. 140, 20 Am. St. Rep. 458.

CASES

IN THE

SUPREME COURT

OF

WEST VIRGINIA.

GRAFTON & GREENBRIER RAILROAD Co. v. DAVISSON.

[45 WEST VIRGINIA, 12.]

EQUITY—RELIEF FROM JUDGMENT AT LAW—ACCIDENT—DEATH OF JUSTICE OF THE PEACE.—When a justice of the peace renders a judgment against a defendant, who applies for a copy of the record, on which to base a writ of certiorari, but the justice sickens and dies without furnishing a copy of the bill of exceptions, and his successor cannot find it, though the docket states that such a bill was signed, the defendant's recourse to a certiorari is blocked, for his case depends on the showing of the bill. The case is clearly one of "accident," whether the bill was unsigned, or signed and lost, the defendant, in either case, being deprived of the benefit of his writ, and equity, therefore, has jurisdiction to give relief by enjoining the judgment; but there must be a good ground for a certiorari, as the accident, alone, would not justify the intervention of equity.

EQUITY—RELIEF FROM JUDGMENT AT LAW—PRACTICE.—A court of equity, when called upon for relief from a judgment at law, does not set aside the verdict and judgment, and order the case to be remanded to the law court for a new trial, when it determines that a retrial should be had.

EQUITY—RELIEF FROM JUDGMENT AT LAW—INJUNCTION—ACCIDENT—PROPER PRACTICE.—When a judgment at law is enjoined in equity, on the ground of "accident," the court must not at once set aside the judgment and grant a new trial, when it determines that a retrial should be had; but, having the parties before it in an independent cause, the proper practice is to direct an issue or issues to be tried at its bar, and, upon the result of the trial, to perpetuate or dissolve the injunction, in whole or in part. The judgment ought to stand as security until it is finally determined whether it shall be perpetually enjoined or not, and, in the meantime, the court should let the injunction stand.

Bill by the railroad company against Davisson for an injunction and equitable relief. There was a decree for the defendant and the plaintiff appealed.

W. R. D. Dent, for the appellant.

W. T. Ice and L. M. La Follette, for the appellee.

¹³ BRANNON, P. Davisson sued the Grafton & Greenbrier Railroad Company before a justice to recover pay for a fence built by Davisson along the line dividing land owned by him and another and land of said company on which its track had been constructed; and upon the trial before a jury the company moved the justice to strike out the plaintiff's evidence, because it showed no liability upon the company, but the justice refused to do so, and rendered judgment on the verdict against the company. The justice's docket states that a bill of exceptions was signed; but Davisson says that the justice informed him that it had not been signed. The company applied to the justice for a copy of the record in order to carry the case to the circuit court by certiorari; but the justice had in the meantime sickened, and shortly died, without furnishing a copy of the bill of exceptions, and his successor could not find any such bill, and, as the case depended on the showing of the bill of exceptions, the company's recourse to a certiorari is blocked. An execution upon the judgment was levied upon a locomotive of the company, and it brought this suit in equity to enjoin the execution and for relief against the judgment; and, the circuit court of Taylor having dismissed the bill, the company appeals.

As the loss of the bill of exceptions, if it was signed, prevents the company from exercising a clear right accorded to it by law—that of applying for redress to a higher court—it is manifest that there must be some redressive ¹⁴ procedure furnished by law against the accident of loss; or, if the bill was not signed, the case is not changed, as the law must furnish some redress against the loss falling upon the defendant from the dispensation of Providence in the death of the justice who alone could sign the document. In either case the jurisdiction of equity is warranted under the well-known head of equity jurisdiction called "accident." Equity gives relief under that head, and this case is one of accident. It is undeniably true that, where a court of law has tried a case, any error therein must be corrected by an appellate process or not at all, as equity does not assume to revise and reverse the action of the law court in those things which it passed upon, and will not do so on matters

not before the court, and which could have been operative if presented, but which were not presented, by reason of negligence; but equity will enjoin judgments at law where there is reason to do so because of fraud, accident, surprise, or some adventitious circumstances beyond the control of the party: *Braden v. Rietzenberger*, 18 W. Va. 286; *Slack v. Wood*, 9 Gratt. 43. A fine statement of the doctrine touching equity jurisdiction to give relief against judgments will be found in 2 *Tucker's Commentaries*, 475, and *Oliver v. Pray*, 19 Am. Dec. 603. Those authorities admit that when the case is one of accident, beyond the party's control, equity interferes. The present case is as clearly one of accident as *Lee v. Foushee*, cited in *Terrel v. Dick*, 1 Call, 553, where a verdict was found late in the evening, and a motion for a new trial was prevented by the change of the members of the court next morning. And I just notice that in *Knifong v. Hendricks*, 2 Gratt. 212, 44 Am. Dec. 385, the fact that the justices who tried the case had left the bench, preventing a motion for a new trial, was held ground for equity's intervention to give a new trial. It is stronger than the case of *Oliver v. Pray*, 4 Ohio, 175, 19 Am. Dec. 595, where a clerk took an insufficient appeal bond, and the Ohio supreme court dismissed an appeal, and then equity granted a new trial. These and other authorities show that equity is the only remedy of defendant. The justice could not make another bill of exceptions, because too sick; and, as the case had ended with him, he could not be compelled to do so ¹⁵ except by a mandamus, and he was sick. It does not appear that the record can be supplied by evidence, if the statute allowing restoration of lost records applies to justices' courts. At any rate, the appellant had done all it was required to do, had presented a bill of exceptions approved by the justice, and no process, after his death, could supply it; and further, at any rate, we have the accident before us as a fact, and equity is the readiest relief for its cure.

The next question occurring to my mind is whether we should say that the accident barring the company from a certiorari is alone cause for equity relief, or must we see that there was good ground for a certiorari. As the law gave absolute right to the company to apply for a certiorari, and this accident prevented the application, does that alone call for equity relief? If we go farther, it would seem to make equity a court of review; and yet ought it interfere where no shadow of ground for charge of error is shown? Ought equity do a clearly vain thing? As the

appeal is to equity, I think it must be shown to it that there is probable cause for saying the party had a case of error, as held in *Oliver v. Pray*, 4 Ohio, 175, 19 Am. Dec. 595. Looking, then, to see whether there is any ground on which to base the allegation that error was committed to the prejudice of the company by the jury and justice, I think that, on the showing made by the record of this cause, there is such ground. Davisson and his co-owner acquired the land after the railroad was running. It does not appear that the land had been condemned by legal process for the railroad, as it is only where there is legal condemnation that a railroad is required to fence improved land. A contract or understanding of indefinite character, between Davisson and Hall, an agent of the company, of power not defined by the record, by which Davisson was to build the fence and be compensated, is relied upon; but that agent must be shown to have power to so contract, and he could make no contract to bind the company to build the fence if the land had not been condemned. He could not, by express contract, bind the company to do what the law did not require it to do.

Next comes the question, What relief shall we give? We cannot set aside verdict and judgment, and, treating the ¹⁶ case as then one still pending in the justice's court, direct it to be remanded to that court for a new trial, though that would seem to be the sensible course. That would be direct action over the law court. Our decisions forbid this. The theory is that the case is perfectly ended in the justice's court, and, therefore, there can be no new trial there. But I think the theory had its birth in the struggle of courts of law as far back as the reign of Edward IV against the jurisdiction exercised by chancery courts to control action at law by injunction, which was branded by the defenders of the common-law courts as simply usurpation of a power to virtually reverse and control the proceedings of courts of law. That struggle ended in the triumph of chancery. It became settled that, while courts of chancery could not merely review actual action of a court of law by review and reversal, it could and ought to exercise jurisdiction, in some mode, to relieve against a judgment which, in equity and justice, ought not to be enforced, because of some fact not before the court of law when judgment was rendered, which diligence could not have presented to it, and which after judgment would not—could not—be heard in the law court to affect the judgment. If the chancery court would set aside the verdict and grant a new trial in the same action, the law court

would not recognize the order, as it would regard this a direct impingement upon its jurisdiction, and make the chancery court its superior. Hence, chancery does not set aside the verdict, and order the law court to grant a new trial, and remand, as does an appellate court, when the very case itself is translated into it by appellate procedure; but, having the parties before it in an independent cause, it directs an issue or issues to be tried at its bar, and, upon the result of the trial, perpetuates or dissolves, in whole or in part, the injunction to the judgment, but lets the injunction in the meantime stand. The court must not at once set aside the judgment, and grant a new trial, when it determines that a retrial should be had, but must await its result, as the judgment ought to stand as security until it is finally determined whether it shall be perpetually enjoined or not: *Knifong v. Hendricks*, 2 Gratt. 212, 44 Am. Dec. 385; *Bank of Washington v. Hupp*, 10 Gratt. 33; *Wynne v. Newman*, 75 1st Va. 811; *Barton's Chancery Practice*, 58; 2 *Story's Equity Jurisprudence*, sec. 1574. The judgment ought to be allowed to stand as security until the final decree, as its lien is good for what may be found to be really due, though obtained by fraud, accident, or surprise, and though what may be due be the whole or only part of the debt recovered: *Bank v. Vanmeter*, 4 Rand. 553, Judge Green's opinion; Judge Lee's opinion, *Bank v. Hupp*, 10 Gratt. 33; just as a judgment reversed in part is all the while a lien: 2 *Barton's Chancery Practice*, sec. 295; *Moss v. Moorman*, 24 Gratt. 97. There are cases where at once the judgment was set aside and a new trial granted; but is improper, as cases above show.

The decree is reversed, the injunction reinstated, and an issue is directed to be tried by a jury in the circuit court to find what amount, if any, Davison is entitled to recover of said Grafton & Greenbrier Railroad Company for building the fence, and, upon a verdict thereon, to perpetuate or dissolve, in whole or in part, the said injunction as to said judgment, and for such purposes, and others proper under equity practice in such cases, the cause is remanded. I also think it was error not to continue the case to allow Hall's deposition to be taken.

EQUITY—RELIEF FROM JUDGMENT AT LAW—ACCIDENT—DEATH OF PRESIDING JUDGE.—If, after a trial at law, the right of appeal is cut off by the death of the presiding judge before he can sign a bill of exceptions, relief may be granted in equity by compelling the adverse party to submit to a new trial, if the judgment appears to be contrary to equity and good conscience: *Kansas etc. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211; *Little Rock etc. Ry. Co. v. Wells*, 61 Ark. 354, 54 Am. St. Rep. 216.

Any accident, such as the illness or death of the presiding judge, before he can settle a bill of exceptions, or hear or dispose of some motion, whereby a party, without any lack of diligence on his part, has been deprived of his remedy by way of appeal or motion for a new trial, warrants the interference of equity to grant relief from the judgment, provided it appears from all the circumstances that but for such accident the remedy might have been prosecuted with success: See monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 243, on relief in equity, other than by appellate proceedings, against judgments, decrees, and other judicial determinations.

EQUITY—RELIEF FROM JUDGMENT AT LAW—NEW TRIAL—PRACTICE.—A court of equity cannot set aside a common-law judgment by decreeing a new trial peremptorily; but, upon it being determined that a new trial is proper, the way to enforce its decree is by operating upon the person of the defendant by attachment, sequestration, and the like: Hunt v. Boyler, 1 J. J. Marsh. 484, 19 Am. Dec. 116. Bills in equity for injunctions against judgments, as well as for new trials of actions at law, are not frequent, yet they are recognized as falling within chancery jurisdiction, and may be sustained in cases of mistake and accident, when no other remedy is adequate: See monographic note to Oliver v. Pray, 19 Am. Dec. 603, on the power of equity to relieve against a judgment at law. A court of equity does not undertake, in direct terms, to grant a new trial, but, a proper case being established, compels the party in whose favor the judgment was entered "to submit to a new trial, or to be perpetually enjoined from proceeding on his verdict": See note to Oliver v. Pray, 19 Am. Dec. 609, showing how and when a new trial at law is obtainable in chancery.

BREWER v. HUTTON.

[45 WEST VIRGINIA, 106.]

ATTACHMENT—EXECUTORS OR ADMINISTRATORS.—PROPERTY IN CUSTODIA LEGIS cannot be attached; and money, credits, and property are in the custody of the law when held by executors, administrators, guardians, and like quasi officers in their representative and administrative capacity.

ATTACHMENT—GARNISHMENT—DEBTOR OF DECEDENT'S ESTATE—EXECUTOR OR ADMINISTRATOR.—Neither a debtor of a decedent's estate, nor the executor or administrator thereof, as such, is subject to garnishment, because it would disturb the law of administration to allow it.

EXECUTORS AND ADMINISTRATORS—RIGHT AND DUTY OF SHERIFF AS ADMINISTRATOR.—After the administration of an estate has been legally cast upon a sheriff, he is thenceforward entitled to all the rights, and is bound to perform all the duties, of the administration. He must, therefore, prosecute all proper actions and suits for the collection of claims due the estate of his decedent, and is entitled to all legal and equitable defenses to actions and suits brought against such estate.

PAYMENT, VOLUNTARY—WHAT IS, AND EFFECT OF.—A voluntary payment made by a garnishee to an attaching creditor is no protection to the garnishee as against his own creditor, and any payment not made under execution will be regarded as volun-

tary, except where the law authorizes the court to require the garnishee to pay the money into court, in which event the payment will be regarded as having the same legal effect as a payment under execution.

EXECUTORS AND ADMINISTRATORS—DEVASTAVIT—LIABILITY OF THOSE WHO TAKE ADVANTAGE OF, WITH KNOWLEDGE.—Whenever an executor or administrator violates his trust, and another person takes advantage of the devastavit knowing that the personal representative is not proceeding according to the requirements of the law, or the terms of the will under which he was appointed, such complicity authorizes those interested in the estate to hold such third party answerable.

Suit by Enoch Brewer against Warwick Hutton, administrator, and others, for a settlement of the accounts and a distribution of the estate. The plaintiff appealed from a decree against himself.

George W. Lewis, for the appellant.

Butcher & Harding, for the appellees.

¹⁰⁷ McWHORTER, J. Joseph S. Brewer, a resident of Green county, Pennsylvania, died insolvent, was the owner of a tract of land in Randolph county, which, just prior to his death, he sold to Omar Conrad for the sum of six hundred dollars. After the death of Brewer his executors collected two hundred dollars of the purchase money, and took two notes of said Conrad of two hundred dollars each, payable, respectively, on the first day of January, 1892, and first day of January, 1893, with interest from the 19th of April, 1891, and conveyed ¹⁰⁸ said tract of land to said Conrad. These two notes, amounting together to four hundred dollars, constituted all the assets of Brewer in Randolph county, of this state. E. M. Everly, one of the creditors of said estate, living in Pennsylvania, assigned his claim to Imri Hunt, then living in Randolph county. Hunt caused the administration of the estate by the county court of Randolph county to be cast upon the sheriff thereof, Warwick Hutton, and at the same time instituted his action at law against Hutton as such administrator, and sued out an attachment summoning Omar Conrad as garnishee. Conrad answered that he owed the four hundred dollars and interest to the estate of Brewer, and would be very glad to pay it if he could be thereby relieved from paying interest. In January, 1892, judgment was rendered in favor of the plaintiff in said action, and an order made directing Conrad to pay the money, which amounted then to four hundred and eighteen dollars and sixty cents, to Hunt, the plaintiff in the action, which order

was not entered, however, until July 8, 1892, when it was entered nunc pro tunc. At the April rules, 1894, Enoch Brewer filed his bill in equity in the circuit court of Randolph county against said Warwick Hutton, administrator with the will annexed of said Joseph S. Brewer, alleging that he is one of the creditors of the estate of said Joseph S. Brewer, who died on the 16th of June, 1891, leaving indebtedness largely in excess of the value of his entire estate, both real and personal; that he left a will, which was duly probated in said Green county; that the executors thereof were appointed and qualified, and took charge of and distributed the estate of the decedent in said state of Pennsylvania; that a copy of the will was admitted to record in the county court clerk's office of Randolph county; that said executors never qualified in said county; alleging the sale of the tract of land by Brewer, in his lifetime, to Omar Conrad for six hundred dollars, and that the said Pennsylvania executors carried out the contract to the extent of receiving one-third of the purchase money and taking two bonds of two hundred dollars each for the residue; alleging that on the 30th of January, 1892, by order of the county court of Randolph county, the estate was committed to the hands of defendant ¹⁰⁰ Hutton, then sheriff, and that said Hutton had collected both of said bonds, with the interest; alleging that the estate was due to the plaintiff the sum of seven hundred and forty-one dollars and forty-three cents, with interest and costs, in the form of a judgment recovered in Pennsylvania, and exhibited a copy thereof; alleging that Hutton had never settled his accounts as such administrator, had made no effort to convene the creditors of the estate, and had not made the lawful and proper distribution of the funds derived by him from the administration of the said estate; and prayed that the said Hutton be required to settle his accounts as such administrator, and the creditors be convened, and the proceeds of the estate distributed properly among the creditors of the estate.

On the fifth day of May, 1894, plaintiff had the cause remanded to rules, with leave to file an amended bill, making Imri Hunt, Enoch M. Everly, and Omar Conrad parties, and on the 25th of July, 1894, he filed said amended bill, making said new parties, alleging, in addition to the allegations of the original bill, that said Everly, finding that the estate of Joseph S. Brewer was wholly insufficient to pay the debts against the same, and knowing of his owning property in Randolph county, came to Randolph, and, after investigation, apparently thinking the

chance well-nigh hopeless, assigned his claim without valuable consideration except some verbal agreement as to sharing the proceeds, should anything be realized, to the defendant Imri Hunt, a former neighbor of Everly's, but then living in the town of Elkins, when said Hunt, knowing of these two purchase bonds owing by Conrad, had the estate cast upon Sheriff Hutton, and then brought his action as before stated; that the answer of Conrad as garnishee was ordered to be filed with the papers, and an order made requiring him to pay the money to Everly for the use of Hunt, which then amounted to four hundred and eighteen dollars and sixty cents, the sum to be applied as a credit upon his (said Everly's) judgment obtained in that action, which said judgment was rendered on the 26th of January, 1892, for the sum of six hundred and sixty-three dollars and sixty-seven cents, with interest and costs; that said Conrad paid over the said sum—four hundred and eighteen ¹¹⁰ dollars and sixty cents—several months before the said order directing him to pay the same was actually entered, or directed by the court to be entered, or was, in legal effect, made by the court; that no attachment bond was ever given by or required of the plaintiff in said action before attaching the said fund in said Conrad's hands; that said Hutton never appeared or made any defense whatever, either in person or by counsel, to said action, as the records expressly declare; that, after the payment of the money by Conrad, Hutton executed to him a deed of conveyance for said tract of land, neither of which deeds had been recorded by said Conrad, and therefore could not be exhibited; and alleging that there were several other creditors of the estate in the state of Pennsylvania who were entitled to share in the fund derived from the sale of the tract of land sold to said Conrad; that said Hutton had never made any effort to convene the creditors of said Brewer in the manner required and provided by law, had never made any settlement of his account as administrator with the will annexed of said Brewer, and had not made the lawful and proper effort to collect, preserve, and protect the funds which ought to have been derived by him from the administration of said estate, and had not made the lawful and proper distribution of the funds which ought to have been derived by him from such administration; and alleging that the proceedings in the action of Everly for the use of Hunt against Hutton, administrator, were fatally irregular, and grossly in fraud of the rights of creditors of said decedent, and ought to be declared null and void in this case, and either the defendant Hutton, or

the defendant Conrad, or the defendants Everly and Hunt ought to be decreed and held to be responsible for the restoration of the said sum of four hundred and eighteen dollars and sixty cents, with interest accrued and to accrue until so restored in the proper channel for distribution among the several creditors lawfully entitled thereto; and praying that such proceedings in said action of Everly for the use of Hunt against Hutton, administrator, be declared null and void, that defendant Hutton be required to make settlement of his accounts as such administrator with one of the commissioners, and in such settlement be ¹¹¹ held personally responsible to said estate for said four hundred and eighteen dollars and sixty cents and interest from the date of the payment of the same by said Conrad, that the creditors of Brewer be convened, and the amounts and priorities of their several demands be ascertained in the manner provided by law, and said sum distributed among the plaintiff and other creditors entitled thereto, either under this court, or else that said fund be transmitted by order of this court to the Pennsylvania executors, or, in case the court should hold the proceedings in said action valid and lawful as to said Hutton, then said Conrad be ordered and required to pay the said fund to said Hutton for distribution among the creditors, or, in case the court should hold said proceedings had in said action to be valid as to Hutton and Conrad, that then defendants Everly and Hunt be ordered to refund said fund so derived by them from said action to said Hutton for distribution, et cetera.

The defendants appeared and demurred to the bill, which was sustained and the bill dismissed as to defendant Conrad, and overruled as to Hutton, Everly, and Hunt, and said defendants were ordered to answer within thirty days. Defendant Hutton filed his separate answer, admitting that he was appointed administrator of the estate of Brewer, and, at the same time he was notified that the estate was committed to him as sheriff, to be administered, he was served with summons in the attachment or suggestion case mentioned in the bill, and attended court, and was at the hearing of said case at the January term, 1892, with counsel to assist him in guarding the interests of said estate; that he was present when said order was made directing the said funds to be paid by the said Conrad to the said E. M. Everly for the use of Hunt; that he did not know until some time afterward that said order was not entered at the time, as he was in court when it was so ordered; that he never had control of said fund, or any part of it, but the court had by its process in said

action taken charge thereof before he had notice that he was appointed as such administrator, or said estate was committed to him as sheriff; that said fund was collected and paid out under the direction of the circuit court of Randolph county, ¹¹² under orders conclusive as to respondent unless he had appealed therefrom to the supreme court, which he was not advised it was proper for him to do, and for which purpose no funds whatever were in his hands; that at no time had any funds belonging to the said estate come into his hands, and, so far as he had been able to ascertain, no other fund than that due from Conrad, and paid by him to Everly under the order of the court, had ever been in said county; and denied every allegation in the bill not in accord with the facts stated by him, and especially denied that he had neglected his duty as such administrator, and that he had not appeared in said action. The defendant E. M. Everly answered the bill, denying that he had assigned his claim to Hunt without valuable consideration except some verbal agreement as to sharing proceeds should anything be realized thereon, but alleged that in the latter part of the year 1891 he assigned his claim to the said Hunt for a valuable consideration, and had no further interest in the said debt, and did not have at the time of the bringing of the action mentioned in plaintiff's bill; that it was brought for the use and benefit of Imri Hunt, who was the sole owner of said writing or bond obligatory, and who had received all the proceeds arising from the fund collected in the suit, and that he had no pecuniary interest in the result of the suit; and denied all allegations or insinuations of fraud or collusion to deprive the plaintiff or any other creditor from collecting any money that might be due from the estate of decedent. Imri Hunt also filed his separate answer denying that Everly assigned him his note or bill without valuable consideration except some verbal agreement as to sharing in the proceeds should anything be realized on said note or bond, but that he purchased said note from said Everly for a valuable consideration, for the reason that he believed at the time he purchased it that he could make out of the estate of Joseph Brewer the principal part of the money then due on it out of the assets known to him at the time to exist and be in the state of West Virginia, because he knew that Omar Conrad was indebted to the estate in the notes mentioned in the bill; that he was a resident of Randolph county, and owed the money for the land purchased by him from ¹¹³ Brewer in his lifetime; that there were no other debts in favor of parties residing in this

estate against the estate of Joseph S. Brewer, and he had the estate committed to Warwick Hutton, then sheriff, and brought his action of debt against the administrator, and caused an attachment to be issued and served upon Conrad requiring him to answer as in said bill alleged; and upon the answer of Conrad and proofs offered to the court in said action at law the court ascertained the amount of money due respondent, and gave judgment therefor against the administrator, Hutton, and ordered said Conrad to pay the money which he owed upon the notes to respondent, to be credited upon his judgment, which had been done; averring that there was no other estate or property belonging to the estate of said Brewer within the state of West Virginia than the money mentioned due from Conrad, and averring that his proceedings were regular and lawful, and intended solely for the purpose of collecting the money due him, and that the proceedings taken were entirely free from the suspicion insinuated against him in said bill of trying to take advantage of plaintiff or any other creditor of Joseph S. Brewer; and denied the allegations or insinuations of fraud or collusion which might be inferred from the allegations in said bill. To this answer the plaintiff indorsed the following exception: "The plaintiff excepts to the foregoing answer, and objects to the same being filed, because the same constitutes no defense to the bill of the plaintiff."

On the 23d of October, 1895, the cause was heard upon the bill of the plaintiff and exhibits therewith, the separate answers of Warwick Hutton, Imri Hunt, and E. M. Everly to the bill of the plaintiff, and general replications thereto, and the court dismissed the bill, and awarded costs against the plaintiff, from which decree the plaintiff appealed and assigned the following errors: "1. Because it was improper to dismiss said bill without having first required the said administrator to make settlement of his accounts as such; 2. Because the payment made by said Conrad before he was legally bound to make it, and to a person to whom he was not bound to pay, could afford him no protection against a proper demand made on behalf of the creditors of said estate; 3. Because ¹¹⁴ the judgment and proceedings in said action at law of Everly suing for the use of Hunt against said Hutton, administrator, was in legal effect a mere nullity, and could afford the defendant Hutton no protection against the petitioner's said bill, for the following reasons: 1. A fund in custodia legis is not subject to attachment. This rule covers a fund in the hands of a personal representa-

tive, including uncollected debts. 2. The proceedings under said attachment were grossly irregular, and strongly tainted with fraud, as appears from the surrounding circumstances."

Section 25, chapter 85, of the code fixes the dignity and priorities of debts and demands against the estates of decedents, and the following section provides: "No payment shall be made to creditors of any one class, until all those of the preceding class or classes shall be fully paid. But a personal representative who, after twelve months from his qualification, pays a debt of his decedent, shall not thereby be personally liable for any debt or demand against the decedent, of equal or superior dignity, whether it be of record or not, unless, before such payment, he shall have notice of such debt or demand"; and further provisions are contained in sections 29 and 30, chapter 87, of the code, relative to distribution and disbursement of estates: *Parker v. Donnally*, 4 W. Va. 648, syllabus, point 1: "The personal representatives of a deceased debtor are not, as such, the debtors of the creditors of their testator or intestate, within the sense of the statute. They are not liable in the debt, but in the detinet only. The personal estate is in their hands to be administered according to law, and is not, therefore, the subject of garnishment by the creditors of the estate of the decedent." It seems to me, in the light of the statute fixing the priorities of debts and demands against and providing for the settlement of estates of decedents, and of the authorities touching the question, that no debtor of an estate can be attached or summoned as a garnishee. In *Thorn v. Woodruff*, 5 Ark. 55, the court says, "To subject executors or administrators to this process of garnishment might destroy the whole operation and intention of our law of administrations. We are, therefore, of opinion that an executor or ¹¹⁵ administrator as such is not subject to garnishment." In *Marvel v. Houston*, 2 Harr. (Del.) 349, the court says: "The act of assembly settles the priority of payment of debts in the administration of assets, and it will not do to allow it to be disturbed in this way. By allowing the debtors of the estate to be garnished, the assets might be diverted from their lawful course of application. Thus funds applicable to judgment debts might be arrested and applied to simple contract debts. Neither an administrator therefor, nor a debtor of the estate, can be attached or summoned as a garnishee. This is the invariable decision": *Conway v. Armington*, 11 R. I. 116; *Waite v. Osborne*, 11 Me. 185; *Bivens v. Harper*, 59 Ill. 21; *Brooks v. Cook*, 8 Mass. 246. *Drake on*

Attachment, section 251: "Property in custodia legis cannot be attached." Waples on Attachment, section 403: "Money, credits, and property are in the custody of the law, when held by executors, administrators, guardians, and like quasi officers in their representative and administrative capacity. They are accountable to courts for what they administer, and there is ordinarily the same reason that the law's custody of things and credits should not be disturbed in their hands as there is for nondisturbance in the hands of a sheriff or other officer." Under section 10, chapter 85, of the code, the administration of the estate of Joseph S. Brewer was legally cast upon the defendant Hutton, as sheriff, and he was "thenceforward entitled to all the rights and bound to perform all the duties of such administrator," which included all legal and equitable defenses to actions and suits brought against the estate of his decedent, as well as to prosecute all proper actions and suits for the collection of claims due the estate. In his answer he says that at the same time he was notified that the administration of the estate was cast upon him he was served with summons in the action brought against him by Everly, use of Hunt; that he "attended court, and was at the hearing of said case at the January term of said court, 1892, with counsel to assist him in guarding the interest of said estate; that he was present when said order was made directing the said funds to be paid by the said Conrad to the said E. M. Everly for the use of Hunt." He fails to allege that he entered any appearance in the case ¹¹⁶ by interposing any plea or objection, or that he did anything whatever to prevent the assets of the estate from being diverted from the proper channel of administration, and applied to the indebtedness of the estate as the law prescribes, but virtually admits that he stood by, and without opposition permitted one of the creditors of the estate to illegally seize and appropriate all the assets over which he had control to his individual claim, to the exclusion of all other creditors, who had equal rights with the creditor who thus got the benefit of all the assets: *Wheatley v. Martin*, 6 Leigh, 62; *Nelson v. Cornwell*, 11 Gratt. 724, syllabus point 6; and in *Cookus v. Peyton*, 1 Gratt. 431, syllabus point 4: "An administrator, paying away the assets of the estate to distributees without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid away, with interest." Section 5, chapter 87, of the code, provides that: "If any fiduciary mentioned in this chapter shall, by his negligence or improper conduct, lose any

debt or other money, he shall be charged with the principal of what is so lost, and interest thereon in like manner as if he had received such principal." It was clearly Hutton's duty to have defended said action and saved said money for the benefit of the estate, and to have administered the same as the law provides. On the contrary, he admits to being present in court when the case was disposed of, and without objection allowed a judgment entered against him for the debt, and an order made directing the debtor of the estate to pay the money due from him to the administrator to the plaintiff in the action, who had summoned him as garnishee.

Appellant insists that Conrad is not protected by the order directing the payment to Hunt, because his obligation was to the Pennsylvania executors, and to them or to Hutton he was bound to make payment until the court, by its judgment, should intervene, and require him to pay it to someone else; that the order to pay it was not in fact entered until July 8, 1892, several months after Conrad had paid the money over to Hunt. "The payment must not have been voluntary. Any payment not made under execution will be regarded as voluntary, and therefore no protection to the garnishee, unless the law authorized the ¹¹⁷ court to require the garnishee to pay the money into court, when such a payment will be regarded as, in legal effect, the same as a payment under execution": Drake on Attachment, sec. 711. Although the bill does not exhibit the affidavit for attachment in the action at law, it does allege the contents of the affidavit, and the grounds stated therein upon which the attachment was sued out, and the fact that no attachment bond was given as required by the statute; yet there is no denial of any of those allegations by any of the defendants, and all of which defects in the action at law it was the duty of the defendant Hutton to have taken advantage of in said action; and for his own protection as garnishee in the attachment proceedings defendant Conrad should have availed himself of the defects in such proceedings: Waples on Attachment, secs. 926, 959, 963. The defendant Hunt, in his answer, says he purchased said note from Everly for a valuable consideration for the reason that he believed at the time he purchased the same that he could make out of the estate of Joseph S. Brewer the principal part of the money then due thereon out of the assets known to him at the time to exist and be in the state of West Virginia, because he knew that one Omar Conrad was indebted to the said estate upon the notes men-

tioned in said bill, and that he was a resident of the county of Randolph, in said state, and owed the money for the land purchased by him from Brewer, and at once commenced the proceedings, and sued out his attachment, and had it served upon Conrad so as to secure the fund in his hands, evidently intending thereby to get the advantage of all other creditors of said Brewer, the record showing that he must have been pretty well acquainted with the condition of Brewer's estate in Pennsylvania; and justifies this harsh remedy by the fact that there were no other debts in favor of parties residing in this state against said estate, and that his was the only one, and that there was no other property or estate belonging to said Brewer in this state. Schouler, in his work on Executors and Administrators, section 394, says: "Whenever an executor or administrator violates his trust, and another person takes advantage of the devastavit knowing that the personal representative is not proceeding according to the ¹¹⁸ requirements of the law or the terms of the will under which he was appointed, such complicity will authorize those interested in the estate to hold such third party liable."

The demurrer as to defendant Conrad was improperly sustained for the reasons herein stated, but the bill should have been dismissed as to him at the hearing, as it is clearly shown that he paid the money with the knowledge, and at least the tacit consent, of the administrator, Hutton. The decree complained of is reversed, with costs against Hunt and Hutton, and the cause remanded for further proceedings to be had to recover from Hunt for the benefit of the estate the money so improperly received by him, and paid him by Conrad, and, in any event, to be charged to said Hutton as administrator, and to be administered in the manner provided by law, and a settlement of the administration accounts of defendant Warwick Hutton.

ATTACHMENT.—PROPERTY IN THE CUSTODY OF THE LAW is not subject to attachment: *Bowden v. Schatzell*, 1 Bafl. Eq. 360, 23 Am. Dec. 170.

GARNISHMENT AGAINST EXECUTORS OR ADMINISTRATORS.—Funds in the hands of an executor or administrator are not subject to garnishment by the creditor of the decedent, before final distribution of the estate has been ordered by the court: *Hudson v. Saginaw Circuit Court*, 114 Mich. 116, 68 Am. St. Rep. 465.

EXECUTORS AND ADMINISTRATORS—DEVASTAVIT—COLLUSION—LIABILITY.—If one colludes with an executor to produce a devastavit, parties interested in the estate may pursue property into his hands: *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537.

PAYMENT TO OFFICER—EFFECT OF, WHEN VOLUNTARY. Payment to an officer who has no immediate authority to enforce

collection is voluntary: Note to Cox v. Welcher, 13 Am. St. Rep. 340. A debtor having notice of the assignment of a debt made by his creditor cannot, by paying moneys to an officer subsequently garnishing the debt, under a writ against the creditor, relieve himself from liability to such assignee: Merchants' etc. Nat. Bank v. Barnes, 18 Mont. 335, 56 Am. St. Rep. 586.

BENT v. LIPSCOMB.

[45 WEST VIRGINIA, 182.]

ATTORNEY AND CLIENT—LIEN UPON JUDGMENT.—

At common law, an attorney has a lien, for his compensation, upon a judgment recovered by him for his client; and a writing authorizing him to retain, as compensation, a part of any recovery of money had by judgment, also gives him a lien upon the judgment.

ATTORNEY AND CLIENT—LIEN UPON JUDGMENT—ASSIGNMENT OF JUDGMENT—NOTICE.—The lien of an attorney at law, upon a judgment recovered by him for his client, for his compensation, is good as against an assignee of the judgment, although the latter was without notice of the lien. The assignee of the judgment takes it subject to the attorney's rights.

ATTORNEY AND CLIENT—ASSIGNMENT—CONFIRMATION OF LIEN.—A writing from a client authorizing his attorney to retain, as compensation, a part of any recovery of money had by judgment, amounts to an assignment, and does not destroy, but confirms, the attorney's common-law lien upon the judgment for his compensation.

Samuel V. Woods, for the plaintiff in error.

P. Lipscomb, for the defendants in error.

¹⁸³ BRANNON, P. Action by Bent against Lipscomb & Lipscomb before a justice, appealed to the circuit court, where, upon demurrer to evidence, judgment was given for defendants. One Kessell, in an action against Hinkle, recovered a judgment.

¹⁸⁴ Bent was one of his attorneys. The common law gave him a lien on that judgment for his compensation as attorney, and he had a writing from Kessell giving him a right to "retain, out of any recovery of money had by a verdict and judgment, one-fourth value of such verdict and judgment in said suit in money, as compensation for his [said Bent's] services as one of my counsel in said case." Lipscomb & Lipscomb were associate counsel with Bent in the case, and took from Kessell an assignment of the judgment, and collected it. Bent brought this action against them to recover his fourth of the judgment. I think the record shows an assignment to the firm, not to one of them. At any rate, the firm collected the money. Counsel

for Lipscomb & Lipscomb says that Bent had no lien. Why not? He had by common law and the writing: *Fowler v. Lewis*, 36 W. Va. 112. Notice of such lien is necessary as to debtor, but not to an assignee of the judgment: *Renick v. Ludington*, 16 W. Va. 378; 3 Am. & Eng. Ency. of Law, 2d ed., 472. This would show right to judgment under the head of assumpsit for money had and received by the defendants to the use of plaintiff—money of his received by them. The evidence shows that defendants had notice of Bent's right, and took the assignment, as one of them declared, with set purpose to keep the money from going to Bent's hands, which shows they had notice of his right, if that were material, as also does other evidence show it, and makes the case all the stronger against them. They said they took the assignment to keep the money from going to Bent's hands, as they had fees. So had Bent. They were justified in taking the assignment; but law and justice to Bent make them take the assignment subject to his rights. They afterward paid half the judgment to Kessell. This seems to show that they took the assignment to defeat Bent. His lien forbade this payment to Kessell. Moreover, that paper from Kessell to Bent was an assignment. It would not destroy, but confirm, his common-law lien: *Bentley v. Standard F. Ins. Co.*, 40 W. Va. 730; 2 Am. & Eng. Ency. of Law, 1055. Defendants had full notice of Bent's right before payment to Kessell, and were warned not to pay him. They could not pay him Bent's money. ¹⁸⁵ As an assignment, it is good against them; and, even if there were no lien, this assignment would sustain the case.

Counsel argues that the court had no jurisdiction, as Kessell was not, but should have been, a party to this suit, and that the constitution says that he cannot be deprived of property without due process of law. Now, it is not with defendants to defend Kessell's rights. The question in this case was, Did defendants collect and refuse to pay money belonging to Bent? Between these parties, that was the sole question—assumpsit for money had and received. If defendants wished to vindicate Kessell's right, why did they not hold the money, and, when sued, claim to be stakeholders and bring in Kessell by interpleader and at once protect Kessell and themselves, and thus have justice done between all parties? Or, even after payment to Kessell, why not show by proof that for some reason, not even hinted at by the record, Bent had no claim to this money, instead of merely demurring to Bent's evidence, which clearly

shows his lien? Kessell could not be a party to this suit. The case is plainly with the plaintiff, and we reverse the judgment, and enter judgment for him.

ATTORNEY AND CLIENT—LIEN UPON JUDGMENT—ASSIGNMENT—NOTICE.—An attorney at law, to secure his professional compensation, has a lien upon a judgment procured by him for his client, and, before judgment, the attorney may, by agreement with his client, obtain an equitable lien upon avails of the suit: See monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 257, 265, on the lien of attorneys. The attorney may enforce his lien against an assignee of the judgment, without notice to him. The assignee of a judgment takes the equitable title, subject to an attorney's lien on the same for a reasonable fee: Note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 269, 279.

BARTLETT v. CLARKSBURG.

[46 WEST VIRGINIA, 398.]

MUNICIPAL CORPORATIONS—GOVERNMENTAL ACTION—INJURY—LIABILITY.—A municipal corporation is not answerable in damages to one who is injured by its taking, or neglecting to take, strictly governmental action.

MUNICIPAL CORPORATIONS—NEGLIGENCE OF OFFICERS—INJURY—LIABILITY.—A municipal corporation is not answerable in damages to one who is injured by the wrongful acts or negligence of its officers or agents.

MUNICIPAL CORPORATIONS—DISCHARGE OF FIREWORKS—INJURY—LIABILITY.—A municipal corporation is not answerable in damages to one who is injured in consequence of the discharge of firearms, squibs, rockets, and fireworks on one of its streets by private persons, although such acts were done with the knowledge and consent of the mayor, council, police, and other officers of the corporation.

Action for personal injuries. The plaintiff sued out a writ of error from a judgment sustaining a demurrer.

W. Scott, for the plaintiff in error.

John Bassel and M. M. Thompson, for the defendant in error.

394 **McWHORTER, J.** R. B. Bartlett brought his action on the case in the circuit court of Harrison county, to recover damages against the town of Clarksburg for personal injuries sustained by plaintiff by reason of the discharge by private persons of firearms, squibs, rockets, and fireworks at a narrow place in one of the streets of said town, on the ground that the said fireworks were discharged by the consent and written permission of the mayor, and with the knowledge and consent of the

council and police and other officers of said town, and that the said discharge of firearms, fireworks, et cetera, was of such a nature as to be a public nuisance, whereby the team of horses of plaintiff attached to his buggy became frightened and unmanageable, and beyond the control of plaintiff, and ran away, throwing plaintiff from his buggy seat, and badly injuring him, for which injuries plaintiff alleges said town is liable to him for damages. The declaration contains two counts. Defendant demurred to the declaration and each count, which being argued and considered, the court sustained said demurrers; and, plaintiff not desiring to amend his declaration, the same was dismissed, and judgment rendered in favor of defendant for costs. No ground of demurrer is contended for, except that the town is not liable, and that an action cannot be maintained against the town for the wrong complained of. The appellant cites *Speir v. Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, which is, as he claims, on all fours with the case at bar, where it is held that "a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance." In the case under ~~395~~ consideration, it is not alleged in the declaration that the written permit was granted by the mayor acting by virtue or under authority of an ordinance of the town. This is about the only particular in which the two cases differ. In *Speir v. Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, the judge says: "It is the settled doctrine of the courts that a municipality is not bound merely by the assent of its executive officers to wrongful acts of third persons; nor could the mayor bind the city by a permit for the granting of which he has no color of authority from the common council, and which was not within the general scope of his authority." The case of *Speir v. Brooklyn*, 139 N. Y. 6, 36 Am. St. Rep. 664, is supported by some other authorities; and I confess I am largely in sympathy with the decision in that case, and agree with Judge Okey as to the nuisance in the case of *Robinson v. Greenville*, 42 Ohio St. 630, 51 Am. Rep. 857, where he says: "That firing of cannon in a public street of a municipal corporation, except in case of imperative and urgent necessity, is an intolerable nuisance, and that all persons engaged in such unlawful act are personally liable for damages caused thereby, are propositions concerning which there is no room for difference of opinion. But a very different question is presented when it is

attempted to fasten liability for such injuries on a municipal corporation."

In the case at bar, the acts complained of are equally as great a nuisance as the firing of cannon, as stated in above case. Appellee contends that "the law in this state has been settled in at least two cases upon all fours with this case," viz., *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665, and *Brown v. Guyandotte*, 34 W. Va. 299. Cooley on Torts, pages 738, 739, says: "Municipal corporations are to be considered: 1. As parts of the governmental machinery of the state legislating for their corporations, and planning and providing for the customary local conveniences of their people; 2. As corporate bodies, through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves, or as the state has imposed upon them; and 3. As artificial persons owning and managing property. In the last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances, under the same rules which govern the responsibility of natural persons. . . . For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporations and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large, or because coasting in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks in the city is temporarily suspended, or because provision is not made for lighting the streets. . . . Neither is a municipal corporation responsible for the failure of its officers to discharge properly and effectively their official duties, for in respect to these the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority." In *Robinson v. Greenville*, 42 Ohio St.

630, 57 Am. Rep. 664, syllabus, point 4: "An assemblage of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges. Held, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision, and control of the streets, 'and shall cause the same to be kept open and in repair, and free from nuisance' (Rev. Stats. Ohio, sec. 2640); and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same." Also *Norristown v. Fitzpatrick*, 94 Pa. St. 121, 39 Am. Rep. 771, syllabus, ³⁹⁷ points 1 and 2: "1. N. was injured, while crossing a street in a borough, by the firing of a cannon by a crowd of citizens. In an action against the borough to recover damages for the injury, the jury, in a special verdict, found that the cannon had been fired at short intervals for several hours, at various points in the borough; that it was not fired at any public or authorized celebration; that a policeman was standing by, and made no effort to stop the firing. A special act of assembly authorized the borough to appoint policemen, remove nuisances, et cetera. Held, that the borough was not liable. 2. Admitting that such an assemblage was a nuisance, and that of the worst kind, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or material obstructions in or near a highway, and resort therefore must be had to the police; but for the doings or misdoings of those who compose this force the municipality is not liable." *Campbell v. City Council*, 53 Ala. 527, 25 Am. Rep. 656: "The city is not liable for injuries resulting from violence, which the police, by diligent discharge of duty, might have prevented. Although appointed by the city, the police are quasi civil officers, for whose misfeasance or nonfeasance in office the city is not responsible, though they are personally answerable." *Lafayette v. Timberlake*, 88 Ind. 330: "A municipal corporation is not liable for a mere personal injury occasioned on its streets by persons making an unlawful use of its streets, as by coasting. A municipal corporation is not liable for failure to exercise governmental powers, as for failure to enforce the state laws or its own ordinances. A municipal corporation is not liable for the negligence of its police officers. They are not its agents, but public officers." *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep.

1: "A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce personal injury, is not liable for a collision occurring upon a street, whereby a traveler was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the streets." *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805: "Where fireworks are discharged ³⁹⁸ within the limits of an incorporated town, in violation of the ordinances of the town, whereby one is injured, the town is not liable for such injury, notwithstanding the town council and officers of the town and a majority of the citizens actively participate in the discharge of the fireworks, and the town, by its officers, makes no attempt to stop the proceedings." *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451: "A municipal corporation having power, under its charter, to make ordinances for the safety of its property in the city, suspended for a short time the operation of an ordinance forbidding the use of fireworks within the city. During such time, plaintiff's building was set on fire, and destroyed, by fireworks negligently used by boys. Held, that the corporation was not liable for such destruction." *Dillon on Municipal Corporations*, section 753: "A municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which, in good faith, it exercises, discretionary powers of a public or legislative character": *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Forsyth v. Mayor etc.*, 45 Ga. 152, 12 Am. Rep. 576; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

Authorities might be multiplied indefinitely. While the decisions are not all on one side, yet the great weight of the authorities, including those of our own state, is with the action of the circuit court in this case. In *Brown v. Guyandotte*, 34 W. Va. 299, syllabus, point 1, it is held that, "as to the powers and functions of a town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein": *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665. The judgment will have to be affirmed.

MUNICIPAL CORPORATIONS—EXERCISE OF GOVERNMENTAL FUNCTIONS—INJURY—LIABILITY.—A municipal corporation is not answerable for the acts of its officers in discharging its governmental functions: *Aitkin v. Wells River*, 70 Vt. 308, 67 Am. St. Rep. 672; *Love v. Atlanta*, 95 Ga. 129, 51 Am. St. Rep. 64. If a power has relation to public purposes and is for the public good, it is classed as governmental: *Springfield etc. Ins. Co. v.*

Keeseville, 148 N. Y. 46, 51 Am. St. Rep. 667. The failure of city officers to perform a public duty in suppressing a public nuisance does not make the municipality answerable: Mayor etc. v. Vandegrift, 1 Marvel, 5, 65 Am. St. Rep. 256.

MUNICIPAL CORPORATIONS — DISCHARGE OF FIREWORKS—INJURY—LIABILITY.—A city is not answerable for an injury resulting from the firing of a cannon in a public street, or the negligent firing of a skyrocket, or the discharge of fireworks, although the council and officers and a majority of the citizens actively participated, and the town officers made no attempt to stop the discharge, though it was in violation of an ordinance: Note to O'Rourke v. Sioux Falls, 46 Am. St. Rep. 765.

WEST VIRGINIA BUILDING COMPANY v. SAUCER.

[46 WEST VIRGINIA, 483.]

MECHANIC'S LIEN—PLEADING.—A BILL to enforce a mechanic's lien does not require very great particularity, because the account filed with the clerk, claiming the lien itself, has great effect.

MECHANIC'S LIEN — PLEADING — SUFFICIENCY.—A BILL to enforce a mechanic's lien is sufficient where it sets out the contract, the work done under it, the amount thereof, the date when finished, and the filing of the account, which gives definite specifications of work, labor, and material.

MECHANIC'S LIEN—CONTRACT CREATING.—To create a mechanic's lien, it is immaterial whether the contract is written or oral.

MECHANIC'S LIEN—COMMENCES WHEN.—A mechanic's lien starts from the first moment when the work or delivery of material commences, even as to subsequent creditors, and certainly as to the owner.

MECHANIC'S LIEN—MAY BE FILED, WHEN.—A builder may, before the completion of the work, file his lien, particularly where the work is to be paid for in installments, some of which are due before the work is completed.

MECHANIC'S LIEN—FILING—DEFICIENCIES IN WORK. Unimportant deficiencies in a building do not prevent a builder from filing his lien and recovering what is due him on it, less abatement for such deficiencies, where the contract for the work has been performed in all its material, substantial features.

MECHANIC'S LIEN—APPEAL—FINDING OF FACT.—A finding of a trial court, upon a question of fact, as to what allowances should be made for abatement, by reason of deficiencies in a building, where it is sought to enforce a mechanic's lien thereon, will not be disturbed where the evidence is conflicting.

EQUITY—DIRECTION OF ISSUE — DISCRETION.—The direction of an issue out of chancery is a matter of sound discretion; and when the court has used its discretion, and gone on without an issue, it cannot be reversed for an omission to direct one, where no issue was asked.

J. M. McMullan, for the appellant.

F. M. Reynolds and L. J. Forman, for the appellee.

488 BRANNON, P. The West Virginia Building Company brought a chancery suit in the circuit court of Grant county against Thomas J. Saucer, to enforce a mechanic's lien for the construction of a building in the town of Bayard, under written contract with Saucer, which resulted in a decree in favor of the company to sell the property, and Saucer appeals.

484 It is claimed for Saucer that the bill was improperly held to be good on demurrer. It is claimed that the bill does not sufficiently set out the contract, whether verbal or written, and its terms and stipulations and conditions. It is true that it is always best to set out a contract with definiteness and particularity, so far as its stipulations are pertinent to the matter to be litigated, but other matters, though in the contract, need not be specified. A bill to enforce a mechanic's lien does not require very great particularity, because the account filed with the clerk, claiming the lien, itself has great effect. This bill alleges that Saucer contracted with the plaintiff to erect on certain lots a large building, and to furnish certain material for same in the construction thereof, and that, in pursuance of and under said contract, plaintiff erected the building, and furnished material therefor; that it was under contract between the parties, and that the contract price for labor and material used and furnished therein all amounted to the sum of four thousand eight hundred and thirty-seven dollars and seventeen cents; that after allowing all credits to which Saucer was entitled, there was due from him fourteen hundred and eighty-three dollars and sixty-seven cents; that plaintiff, on the 2d of February, 1896, ceased to labor on and furnish material for the building; and the bill says that the work was done and material furnished and building erected under a contract taken the — day of 1895, not saying whether written or oral. The account claiming the lien, filed in the clerk's office under the statute, was exhibited with the bill. Surely, this bill charged all that seems essential—the contract, the work done under it, the amount thereof, the date when finished, and the filing of the account. It is immaterial whether a contract be written or oral, to create a mechanic's lien. The account gives definite specifications of work, labor, and material.

It is claimed for Saucer that, when the mechanic's lien account was filed in the clerk's office, the work had not been fully completed, and therefore the account could not be filed, and created no lien. This objection goes to the very root of the plaintiff's demand. The compensation to be paid the con-

tractor was payable in installments as the ⁴⁸⁵ work progressed, and it does seem to me that the builder may, before the completion of the work, file his lien. Our statute gives him a lien over other liens arising subsequent to the time "when such labor shall have been performed or material furnished"; that is, as to subsequent creditors, and surely so as to the owner. I think that this lien starts from the first moment when the work or delivery of material commences, even as to such creditors, and certainly as to the owner: Phillips on Mechanics' Liens, sec. 216; Oriental Hotel Co. v. Griffith, 88 Tex. 574, 53 Am. St. Rep. 790. See opinion in Charleston Lumber etc. Co. v. Brockmyer, 18 W. Va. 590. Suppose the builder files his lien after the lien starts, and afterward completes the work, Shall his lien be overthrown because his account is filed before completion? I would think not. I know that the code does say that the lien shall be discharged unless the builder shall, "within sixty days after he ceases to labor on, or furnish material or machinery, file his lien account." But as said in Luter v. Cobb, 1 Cold. 528: "The limitation is intended for the benefit of creditors of the owners and purchasers, to protect them from fraud and injury by the operation of this secret lien." It gave that time to the mechanic to continue his lien—that is, his last point—but that does not say that he need wait until then if his lien is once commenced. He need not file his lien before that time. He may go on to work, and he has his lien from its commencement or when he began furnishing material, and the statute gives him a lien over any creditors whose liens arise after his lien commences, without any recordation, because the law gives notice to the world that the mechanic's lien attached to the building, which lien he may enforce by filing within sixty days after completion. While the work is going on, no notice is necessary; the work itself is that. But if the mechanic, after completion, waits longer than sixty days, his lien is gone; certainly, as to creditors: Merchants' etc. Bank v. Dashiell, 25 Gratt. 625. .

As installments in this case were due before the completion, I would think a lien filed before completion would be good. My idea is that a lien, though not necessary if filed at once after it commences, is good for the whole contract price when completed; and even if the work ⁴⁸⁶ be not completed, yet, if the party would be by law allowed to recover for what work he did or what material he furnished in an action of assumpsit upon a quantum meruit or quantum valebat, his lien would

be good in equity for the same. But in this case it is not necessary to go so far, as this decision does not require it. The work was substantially completed before the account was filed. The defendant had made certain payments. He had taken possession of the house, and there remained to be done on it very inconsiderable work, compared with the total. It certainly is true in law if there be a substantially completed, though not perfectly completed, contract, the claim may be filed, and the defendant may recoup or abate from the contract the value of the failure. He can claim damages for noncompletion. He has no right to forfeit all that the builder has done. If, in an action at common law, the builder would be allowed to recover any sum after the abatement to the owner of his damages, for the noncompletion of the contract, then in a suit in equity he would likewise recover. Justice is thus done to both parties. If the deficiencies are unimportant, and may be easily made up, the lien is still good: *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268; *Stewart v. McQuaide*, 48 Pa. St. 191. But in this case Saucer accepted the building, took possession of it, rented it out; and surely, under such circumstances, he must pay what the material and work are worth—in other words, the contract price, with such abatement as the shortcomings of the contractor called for: *Bell v. Teague*, 85 Ala. 211; *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665. It is very clear that any recoupment or abatement to which the owner is entitled can be allowed in chancery, in a suit by the mechanic or builder on his lien: *Phillips on Mechanics' Liens*, sec. 140. When the contract is entire, and the building substantially finished, and it is treated by all parties as completed, though some unimportant parts be not completed, if the time limited by the statute is suffered to elapse before these unimportant things are done, more especially if intervening rights in favor of a third party have attached, the lien cannot be successfully asserted: *Luter v. Cobb*, 1 Cold. 526. That treats the unimportant deficiencies as ⁴⁸⁷ inadequate to keep up the right to file the lien; that is, the date for filing does not run on till their completion. Conversely, it is true that those unimportant deficiencies did not prevent the builder from filing his lien, and recovering what was due him on it, less abatement for such deficiencies.

The claim is urged that the sum allowed Saucer for abatement is too small. It was one hundred and fifty-three dollars and

twenty-one cents. The evidence shows that the items of work to fully complete the building were not important, but I have this to say under this head, that the recoupment depended upon a large number of witnesses, largely on their mere opinion, and this evidence conflicted, especially as to what allowances should be made for abatement. There was a great mass of evidence taken on this, and the allowance is based on mere estimates, and it cannot be expected that upon this mere question of fact, standing on conflicting evidence and inferences and deductions therefrom, this court should reverse the finding of the circuit court. I think it substantially right: *Hall v. Hall*, 30 W. Va. 780; *Richardson v. Ralphsnyder*, 40 W. Va. 15; *Dorr v. Dewing*, 36 W. Va. 466.

It is claimed that the court should have directed an issue out of chancery to pass upon the question of what allowances for abatement should have been made. It is very difficult to reverse a decree for failure of the court to direct an issue, because a large discretion is given the court therein, and the rule when it should and should not do so cannot be well defined. Our code, chapter 131, section 4, says that the court, when "there is such confliction in the evidence as in the opinion of such court to render it proper, may direct an issue." It prohibits it in any other case. This tells itself of a large discretion. *Powell v. Batson*, 4 W. Va. 610, holds that the proper criterion by which to test the propriety of such an issue is that, where in a given case the decree rendered is sustained with reasonable certainty by the facts and circumstances, there would be no error in refusing to direct an issue to try any material matters put up in issue therein. The evidence was conflicting. It was not so particularly as to any particular ⁴⁸⁸ fact in issue, but on this mere estimate of the value of deficiency; and the evidence does, with reasonable certainty, sustain the court's finding, as much so as in such a case could be expected. A court can and should itself decide matters of fact, and even state an account, and save the cost and time of a protracted jury trial, if it have such data and evidence as to enable it to do so properly: *Darby v. Gilligan*, 43 W. Va. 755; *Barton's Chancery Practice*, 848.

A further consideration in this case is that no issue was asked. I am impressed with the opinion that when a court has used its discretion, and gone on without an issue, it cannot be reversed for omission to direct one, unless it be asked. This is sustained by *Dorr v. Dewing*, 36 W. Va. 466, holding that, if a cause has been heard without order of reference asked or sug-

gested, a party cannot, for the first time in an appellate court, assign the failure to direct a reference, unless it appear that manifest injustice has been done him thereby. I should think it would be much more so in the case of failure to direct an issue than as to the failure to direct a reference to commissioner. Judge Snyder says, in *McKinsey v. Squires*, 32 W. Va. 43, that the party should ask an issue if he wants it.

Complaint is made that there was no reference to a commissioner. I have already, by reference to the case of *Darby v. Gilligan*, 43 W. Va. 755, answered this objection. There was no complicated account to be made before a commissioner, no ascertainment of liens and priorities. When the court, having the contract price before it for the building, made up the sum which the defendant should be allowed for recompense, the matter of the account was ended. Why could not a judge do this, as well as a commissioner?

As to the complaint that the lien under the deed of trust in favor of the National Building and Loan Company was not ascertained and decreed: That company and its trustee were before the court. The decree gave the building company a first lien, and fixed its amount, and then declared that the next lien was that of the National Building and Loan Company under its deed of trust, but did not fix its amount. Note the company and its trustee are ⁴⁵⁰ not complaining of this; only Saucer is. It is strange that he should complain of the failure of the court to declare that his property should be sold unless that lien, too, were paid. The decree is favorable to him in this respect, in not making him pay that deed of trust debt at once. Moreover, it was a subordinate lien. Moreover, it was a lien payable by monthly payments, as building loans usually are, and it would have been improper to decree its payment long before maturity. Of this, had it been done, Saucer could have complained, and, as to the amount of it, it could not have been fixed. It was not yet due. He certainly knew its amount. It was not necessary that the sale should raise an amount to cover it. He had the right to go on and pay it in monthly payments.

Complaint is made that the property was not rented, instead of sold. Now, the mechanic's lien statute commands a sale, and does not require the mechanic to wait five years for his money. He is entitled, by the very letter of the statute, to a sale. The statute, in the case of judgment liens, says that, if five years' rental will pay them, no sale shall be made, but this case is governed by the mechanic's lien statute. We affirm the decree.

MECHANIC'S LIEN—COMMENCEMENT OF—NOTICE.—The right to a mechanic's lien becomes vested at the time the material is furnished and the necessary steps are taken, under the statute then in force, to perfect the lien. The lien does not attach until notice is given in conformity with the statute: Note to Taylor v. Dahu, 51 Am. St. Rep. 816. The notice is sufficient when it describes the premises and states the amount due, to whom and from whom, and for what it is due: Note to Morrison v. Willard, 70 Am. St. Rep. 787.

MECHANIC'S LIEN—COMPLETION OF WORK.—The fact that a building is not completed according to contract does not necessarily prevent the enforcement of a mechanic's lien against the building, in the absence of a statute so limiting the right. But the owner is entitled to show how much of the work remains undone, what it will cost, according to the contract, to complete it, and to have such amount deducted from the contract price: Note to Goodman v. Baerlocher, 43 Am. St. Rep. 904.

APPEAL—FINDINGS—CONFLICTING EVIDENCE—REVIEW. A finding of the court below will not be disturbed by the supreme court, where there is a conflict of evidence: St. Louis etc. R. R. Co. v. Terhune, 50 Ill. 151, 99 Am. Dec. 504; although it may be of the opinion that there is a preponderance of evidence against the finding: Lick v. Madden, 38 Cal. 208, 95 Am. Dec. 175. A finding of fact made by a jury or trial judge will not be disturbed by the appellate court, if it is supported by competent evidence: Note to Singleton v. Hill, 51 Am. St. Rep. 869. Compare Shultz v. Shultz, 150 Ill. 654, 50 Am. St. Rep. 188.

LAMBERT v. NICKLASS.

[45 WEST VIRGINIA, 527.]

AGISTMENT—LIEN FOR THE KEEPING OF ANIMALS.—A statute declaring that "persons keeping livestock for hire shall have the same rights and remedies for the recovery of their charges therefor as innkeepers have," gives to anyone keeping livestock for compensation a lien for such compensation—a lien like that of an innkeeper. In such cases, it is the keeping, and not possession alone, which gives rise to the lien.

JUDGMENT—MERGER—DESTRUCTION OF LIEN.—A judgment does not merge a cause of action, so that it cannot be sued on again; neither does it destroy a lien acquired on property which is the subject matter of the suit.

AGISTMENT—LOSS OF LIEN BY ATTACHMENT.—One who keeps livestock for compensation, and who has a statutory lien thereon for such keeping, does not lose it by levying an attachment upon the property, particularly where the officer lets the lien owner keep it in his custody.

Suit by Lambert against Nicklass and others. There was a decree for the defendants and the plaintiff appealed.

W. H. Travers and Wisner & Woods, for the appellant.

Flick, Westenhaver & Baker, for the appellees.

⁵²⁷ BRANNON, P. Lambert kept a horse and buggy for Brown, claiming a lien for the keeping, refusing to let Brown

take them without payment. Brown agreed that they should stand good for their keeping. Brown became insolvent and assigned for the benefit of creditors, but did not include this property in his assignment. Lambert sued for keeping the property, levied an attachment on it, the officer leaving it ⁵²⁸ in his possession. The attachment was quashed, but personal judgment was rendered for the debt. Afterward, Nicklass Brothers & Co. levied an execution against Brown on the property, and Lambert procured an injunction against selling, and the court held that Lambert had no lien, dissolved the injunction, and gave the execution preference over Lambert's lien, and Lambert appealed.

Lambert claims a lien for keeping a horse and buggy at his stable belonging to Brown, under section 15, chapter 100, of the code, that "persons keeping livestock for hire shall have the same rights and remedies for the recovery of their charges therefor as innkeepers have." It is questioned by counsel whether Lambert ever had any lien. Counsel say that agisters and liverymen have no lien at common law, as is true: 13 Am. & Eng. Ency. of Law, 1st ed., 943. They say that an innkeeper has a lien on the goods of his guest, as he has sole and exclusive possession, not concurrently with the owner; but that one who merely feeds and takes care of a horse has not sole possession, but one concurrent with the possession of the owner; that only exclusive possession gives a lien. Now, I see little difference as to possession. The transient guest sometimes takes his horse and uses him during his stay at the inn, as does one who merely keeps his horse at the stable. It is the keeping the guest and the keeping the horse that gives rise to the lien, not alone possession, that being only the means of enforcing pay. It is very plain to me that the statute intended to remedy the defect of the common law, and give anyone keeping livestock for compensation a lien for such compensation—a lien like that of the innkeeper. Of course, it does not mean one who keeps stock to be hired, as there the compensation goes to the other party for use of the stock; but it means to give a lien to anyone who, for hire or compensation, keeps stock. Lambert clearly had a lien.

But it is said Lambert waived or forfeited his lien by bringing action for the same demand before a justice, and levying an attachment upon the property. First, it is argued that judgment in this action merged and destroyed the lien. Judgment does merge the cause of action, so that it cannot be sued on again; but I understand that in law ⁵²⁹ the debt is one thing

and its lien on given property another thing, and that judgment does not destroy the lien. The creditor may enforce both, and his election of one does not exclude the other as a remedy. "Though the debt is merged in the judgment, its nature is not destroyed or affected; and if the debt was one for which a lien was given at common law or by statute, the lien continues after judgment": 1 Jones on Liens, sec. 1032a.

But it is claimed with more confidence by counsel for appellees that the lien given by this statute is like that given an innkeeper by common law, and that, as loss of possession destroys the innkeeper's lien, so the levy of the attachment took away from Lambert the possession, and gave the officer possession, and thus lost Lambert's lien. There is quoted to us the passage from Jones on Liens, section 1014, saying: "An attachment of goods by one who claims a lien on them, to secure the same debt for which the lien is claimed, is a waiver of the lien. The attachment is, in effect, an assertion that the property belongs to the defendant. Having made the attachment, he is estopped from afterward asserting the contrary." Also Herman's Law of Executions, section 172, saying: "Taking property in execution at the suit of a party having a lien thereon destroys the lien by changing the possession from the bailee to the officer, though the property is left with the party. The possession must of necessity vest in the officer in order to enable him to sell the property." And citations from 13 American and English Encyclopedia of Law, 586, and Jones on Liens, section 328, to the effect that a carrier's lien is lost by his attaching property. As to the clause from Jones, that "the attachment is an assertion that the property belongs to the defendant," I will say that there is no force in it, because by claiming a lien the plaintiff asserts that it belongs to the defendant as much as by attaching it. He asserts the same thing by both lien and attachment, and no estoppel can, therefore, be based upon any contradiction between the two. Very little authority is cited for the above-cited doctrine; the same is cited for all the propositions above given. Regarding it unreasonable, I have sought to trace its origin, and find it in an English decision in 1828 (*Jacobs v. Latour*, 5 Bing. 130), holding that where one entitled to a lien as stable ⁵³⁰ keeper and trainer sued and sold and bought the horses under execution, he could claim, in trover against him by an assignee in bankruptcy, only under the execution, not under his lien, his lien being waived by the execution. *Legg v. Willard*, 17 Pick. 140, 28 Am. Dec. 282, seems to hold that

when one has a lien, and attaches for the same debt, his lien is gone; but it is a mere assertion, and no discussion of any authority. *Wingard v. Banning*, 39 Cal. 543, is cited for the proposition; but there the affidavit declared the creditor had no lien, which was an express renunciation of it. It seems only three out of five judges concurred in the opinion. In *Arendale v. Morgan*, 5 Sneed, 703, the question is considered, and the court refused to follow that doctrine, and held that where one has property in pledge for debt, and parts with possession with intent to abandon the lien, as if he agrees that it be attached at the suit of a third person, it is gone; but not so where he attaches for his own debt. This is the true position.

To sustain this loss of lien we must place it on one or the other of two ideas—intentional waiver, or from loss of possession. As to the first, authority is abundant to show that one will not be held to waive a lien unless the intent be express or very plain and clear. The presumption is always against it. Merely taking a new security does not: *Bansimer v. Fell*, 39 W. Va. 448; *Hopkins v. Detwiler*, 25 W. Va. 734, 748; *Hess v. Dille*, 23 W. Va. 97. So with the innkeeper's lien: 11 Am. & Eng. Ency. of Law, 49.

And as to the loss of lien by loss of possession: An innkeeper having a lien has no right to sell the property without a judicial proceeding. If he does, he is liable to an action of trover for its unlawful conversion, besides losing his lien. His only remedy is to hold it till payment. Unreasonable this is; but, where no statute can be found providing for a sale, it is so, by much authority: 11 Am. & Eng. Ency. of Law, 1st ed., 46; *Jones on Liens*, sec. 523. In fact, on the mere strength of lien, he can sue neither at law nor in equity, if there is no statute to allow it. It is different from a pledge or pawn: 13 Ency. of Pl. & Pr. 127; 1 *Jones on Liens*, secs. 1033, 1038. The horse is in the innkeeper's stable eating its head off, and he has no remedy. Suppose, ⁵³¹ however, by reason of nonresidence or other cause, the innkeeper can sue out an attachment, why shall he not do so? He is not thus waiving, but enforcing, his lien. Why it should be said that, when the officer levies on the property to enforce this lien, the innkeeper loses his lien because he gives up possession, I cannot see. The officer is his agent for this purpose. To say so is technical in the highest degree, and defeats justice. The innkeeper is not surrendering possession to the owner, nor to an officer acting in furtherance of his demand. He could bring a suit, as shown above, without

forfeiting his lien; and by resorting to an attachment he simply availed himself of a fact giving him the right to attachment to enforce a debt for which there was a lien, using a cumulative remedy. Houck on Liens, section 6, says, "If possession is relinquished after the lien attaching, the lien is gone; for, by parting with possession, the creditor shows that he trusts to the personal credit of the debtor"; and cites numerous authorities. This is so where he lets the owner or an officer under process for debts of others have possession. Then you can fairly say that he looks to the debtor only; and that, as Houck says, is the reason why surrender of possession destroys the lien. But how can we say that Lambert intended to look to the personal credit of Brown by an act which told the very reverse, and told that he looked to the property for pay, not to Brown? Furthermore, Brown expressly pledged the horse to Lambert for his keep. Lambert could sell it as a pawn. This he could do by agent, and the agent's possession would be his. Is the officer anything but his agent? He is responsible for the officer's trespass, because he acts for him. Judge Story condemns this doctrine as not well established, and says the Massachusetts ruling was local to that state: Story on Bailments, sec. 366. In *Townsend v. Newell*, 14 Pick. 332, one had goods, with right to lien, and an attachment was levied in favor of a creditor, and he refused to give them up, but kept possession, and gave a receipt to the officer for them. Later he levied an attachment for his own lien debt, still retaining possession, but receipting to the officer for the goods. It was held that the lien was not lost. There, as in this case, the officer let the lien owner keep the goods in ⁵³² his custody. In that case, it is true, he expressly claimed his lien; but who imagines that Lambert intended to give up his lien? His attachment itself speaks the negative.

In that case, after levy, it was as much the officer's possession as in this, and the court did not give it the force of forfeiture of lien, but said, as the party did not intend to surrender it, it still held good. There is no evidence that Lambert intended to give up his lien, and if it stands on intention, and not on loss of possession, he who asserts such intention must make it clear. In *Whitaker v. Sumner*, 20 Pick. 399, where one having a pledge allowed a levy for a debt once owned by him and debts of strangers, he was held to have lost the lien; but Chief Justice Shaw was careful to say, "We would not be understood hereby to hold that an attachment under all circum-

stances, though made by the party holding the pledge, or by his consent, would be a waiver of the lien." I have not said anything about jurisdiction in equity, as the question was not raised or discussed. Decree reversed, and the case is remanded, with direction to the circuit court to enter a decree allowing Lambert's debt as a lien, to be paid out of the proceeds of the property, in preference to the execution of Nicklass Brothers & Co.

AGISTER'S LIEN.—Agisters and livery-stable keepers have no lien for keeping or pasturing animals intrusted to them: Note to *Lowe v. Woods*, 38 Am. St. Rep. 305; *Miller v. Marston*, 35 Me. 153, 56 Am. Dec. 694. An agister's lien, created by statute, is paramount to the lien of a prior chattel mortgage upon the same cattle: *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425. Contra, *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208.

JUDGMENT—MERGER.—A judgment upon a contract debt merges it, but not so completely that courts cannot look behind the judgment to the original cause of action for the purpose of protecting the rights of parties: *Napier v. Gidlere*, 1 Spear Eq. 215, 40 Am. Dec. 618; note to *Clark v. Bowling*, 53 Am. Dec. 301.

WELTON v. BOGGS.

[45 WEST VIRGINIA, 620.]

LIMITATIONS OF ACTIONS—PLEA OF STATUTE—COMPELLING DEBTOR TO PLEAD—PERSONAL PRIVILEGE.—The law does not compel a living debtor to plead the statute of limitations. It is a personal privilege which he can avail himself of or not, as he pleases.

LIMITATIONS OF ACTIONS—PLEA OF STATUTE BY STRANGER—COMPELLING DEBTOR TO PLEAD.—The privilege of the plea of the statute of limitations being personal, a mere stranger to the claim, as a creditor, although he may be injuriously affected by his debtor's failure to set up the statute, cannot do so himself, or compel his debtor to do so.

LIMITATIONS OF ACTIONS—PLEA OF STATUTE BY ONE CREDITOR TO DEFEAT ANOTHER.—A creditor cannot, during the lifetime of his debtor, and in a suit against the latter, plead the statute of limitations to defeat the claim of another creditor, in whole or in part. He is not entitled to the benefit of such plea.

LIMITATIONS OF ACTIONS—PLEA OF STATUTE BY JUDGMENT CREDITOR—COMPELLING DEBTOR TO PLEAD—ILLUSTRATION.—If a judgment creditor brings a suit in equity to subject the lands of his debtor to the satisfaction of the judgment, and sets up the existence of an older judgment in favor of another person, which is barred by the statute of limitations, but the defendant, being alive, does not plead the statute as to that judgment, which, if done, would give the plaintiff's judgment priority, the complainant cannot compel him to do so, nor file such plea himself. The judgment debtor alone can make the plea available.

Bill by Welton against Boggs and others. There was a decree for the defendants and the plaintiff appealed.

F. M. Reynolds and L. J. Forman, for the appellant.

George A. Blakemore, for the appellees.

¶⁶²¹ ENGLISH, J. At the May rules, 1894, for the circuit court of Pendleton county, S. A. Welton filed a bill against E. W. Boggs, W. S. Boggs, trustee, I. P. Boggs (since deceased), Solomon Cunningham, M. Manzy, and J. W. Warner, in which she alleged that on the sixteenth day of April, 1886, she obtained a judgment against defendant E. W. Boggs in said court for the sum of five hundred and twenty-two dollars and thirty-three cents, with interest thereon from that date, and costs; that on the twenty-fifth day of May, 1886, said judgment was duly docketed in the judgment lien docket of said county; that execution was issued on said judgment on April 23, 1886, and placed in the proper officer's hands returnable to July rules, 1886, which execution was duly returned: "No property found to levy on to satisfy this execution, or any part thereof. June 29th, 1886"; that no part thereof had been paid; and that said judgment constituted the first lien on the real estate of said E. W. Boggs, which is described in the bill. It is also alleged in plaintiff's bill that from the records of said county it appears that on the 15th of May, 1879, judgment was rendered against said E. W. Boggs and Solomon Cunningham in favor of David Goff, commissioner, use of William Adamson, for the sum of five hundred and forty-nine dollars and thirty-seven cents; that execution was issued on said judgment on June 17, 1879, returnable to the first day of August, 1879; that the records do not show any return of said execution, ⁶²² but that no execution has issued thereon since, and that said judgment is barred by the statute of limitations, and constitutes no lien on the real estate of said E. W. Boggs mentioned in the bill; that there was no personal property of the defendant Boggs out of which her judgment could be made; and that the real estate of said Boggs would not rent in five years for a sufficient sum to pay off her judgment and costs. The plaintiff charges that her judgment aforesaid is the first lien on all of said real estate, and should first be paid out of the proceeds arising from the sale of said real estate; that the judgment aforesaid in favor of Goff, commissioner, use of Adamson, is out, by the statute of limitations, and constitutes no lien on any of said real estate; and that said

Goff judgment should be credited by several payments, the amount of which was not known to plaintiff. And she prayed that her judgment lien might be enforced against said land.

On the 15th of June, 1894, the bill was taken for confessed as to the other defendants, except E. W. Boggs, who appeared and demurred to said bill. Demurrer was overruled, and cause referred to a commissioner to ascertain the real estate owned by the defendant Boggs, its character and location, its value, annual and absolute, and the liens binding the same, whether by judgment or otherwise, and their priorities. Said commissioner returned his report, giving the real estate owned by Boggs, and ascertaining that the plaintiff's judgment described in her bill was entitled to the first place in point of priority of lien against said real estate, and the deed of trust executed by Boggs and wife to W. H. Boggs, trustee, to secure to William Adamson said judgment for five hundred and forty-nine dollars and thirty-seven cents, costs, and interest, subject to a credit of three hundred dollars paid February 27, 1894, was entitled to the second lien on said land. This report was excepted to by J. P. Boggs, executor of the will of William Adamson, deceased, for the reason that it gave priority to the lien of S. A. Welton over the lien of William Adamson; the deed of trust lien having been taken to secure the payment of a judgment obtained long prior to the judgment of S. A. Welton, and said judgment of Adamson ^{was} being, at the time said trust deed was taken, alive, and on the lien docket of said county. On the eleventh day of April, 1896, the cause was heard, and said exception to the commissioner's report was sustained, and the court decreed that said deed of trust was entitled, as a lien, to priority, and that the plaintiff Welton's judgment constituted the second lien on all the real estate aforesaid, and directed a special commissioner therein named to sell said real estate in the manner and upon the terms therein prescribed. From this decree the plaintiff, Welton, obtained this appeal.

The appellant made four assignments of error, all of which apply to the action of the court in sustaining said exception to the commissioner's report, which may be considered together.

Did the circuit court err in holding that the deed of trust, or the judgment it was executed to secure, was entitled to priority over the plaintiff's judgment? Now, while it is true that the plaintiff in her bill claims that she kept her judgment alive in the manner prescribed by the statute, and that the defendant Adamson allowed his judgment to expire, by neglecting to

comply with the statutory requirements, yet the first question we encounter in considering this case upon the questions raised by the exception to said commissioner's report is whether the plea of the statute of limitations has been interposed in this case by any person entitled to the benefit of said plea. Can this plea be successfully relied upon by a cocreditor in a suit pending against a live debtor? Or is it a personal plea, which the judgment debtor alone could make available? Wood, in his valuable work on the Statute of Limitations, volume 1, page 96, under the head of "Personal Privilege," thus states the law: "The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election. . . . A cestui que trust may set up the statute whenever his trustee might do so, . . . and generally any person in privity with the claim sought to be enforced may set up the statute in bar thereto, as an executor, administrator, assignee, trustee, or any person who can be said to stand in the place and stead of the person for whose benefit the statute inures; ⁶²⁴ but a mere stranger to the claim, as a creditor of such person, although he may be injuriously affected by his debtor's failure to set up the statute, cannot do so himself, or compel his debtor to do so, as in such cases the privilege is personal, and one which the debtor may avail himself of, or not, at his election." In the case at bar, the debtor has seen proper to exercise his election by declining to interpose the plea (which, in my opinion, would have been effective, and given the judgment of the plaintiff the priority); and, having made such election, could the plaintiff file the plea herself? A question similar to this was presented to this court in the case of *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549, and it was there held that: "The plea of usury is a defense personal to the debtor. Therefore, in his lifetime his creditor cannot plead it to defeat the claim of another creditor in whole or in part." Johnson, president, in delivering the opinion of the court, said: "In *Woodyard v. Polsley*, 14 W. Va. 211, we held that after a man was dead, and his estate was being distributed among his creditors in a court of equity, a creditor might rely on the statute of limitations to defeat the claim of another creditor. But this was put upon the principle that it was then impossible for the debtor to plead the statute of limitations; his voice was hushed; the law made it the duty of his personal representative to plead the statute of limitations, and, if the personal representative did not do it, the creditors might do so, as against

each other. With a living man it is altogether different. The law does not compel him to plead the statute of limitations. It is a personal privilege, that he can avail himself of or not as he pleases." It is true that was a usury case, and these remarks were presented by way of illustration; but the analogy is strong and apparent, and, in my opinion, the plea of usury being a personal plea, the same rule applies with regard to the plea of the statute of limitations. Again, in the case of Clayton v. Henley, 32 Gratt. 72, Staples, judge, delivering the opinion of the court, says: "The court is further of opinion that the plea of the statute of limitations is, in general, a personal defense, to be made by the party against whom the demand is asserted, or to be waived by him, if he desire so to do. If a debtor, recognizing the indulgence of his creditor and the justice of his demand, is ^{not} unwilling to plead the statute, it is difficult to tell upon what ground a third person, who merely asserts the title to the property, can be permitted to do so." In the case under consideration, the defendant, E. W. Boggs, for some reason known to himself, has not filed his personal plea, or in any manner raised the question as to the validity of the judgment of William Adamson; and my conclusion from the authorities above quoted is that the exceptions filed by the executor of William Adamson to the commissioner's report were properly sustained by the circuit court. The judgment complained of is affirmed, with costs and damages.

ON REHEARING.

After a careful consideration of the briefs of counsel for the appellant, and the examination of the authorities cited, I find no cause to change the opinion above quoted; and the same is hereby adopted, and the decree complained of is affirmed.

STATUTE OF LIMITATIONS—PRIVILEGE OF PLEADING.—An administrator is not bound to plead the statute of limitations against a debt due by his intestate to a third person, nor against a debt due from him as administrator to himself in his individual capacity: *Baker v. Bush*, 25 Ga. 594, 71 Am. Dec. 193.

BUTLER v. THOMPSON.

[45 WEST VIRGINIA, 680.]

VENDOR AND PURCHASER—VERBAL CONTRACT FOR SALE OF LAND—PURCHASER'S RIGHT AS AGAINST LIEN OF SUBSEQUENT JUDGMENT CREDITOR OF VENDOR.—A purchaser of land by parol contract, which has been so far executed as to vest in him the right to compel his vendor to execute the contract in a court of equity, has an equitable right in the land, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor.

SPECIFIC PERFORMANCE OF VERBAL CONTRACT FOR SALE OF LAND MAY BE DECREED, WHEN.—A plaintiff is entitled to the specific performance of a verbal contract for the purchase of land, notwithstanding the statute of frauds, where the contract is specifically set forth, with a statement of the amount of the purchase money, and it is alleged that the purchase money was paid to the vendor, that the plaintiff was in possession at the time of the purchase, and that he has made valuable improvements upon the faith of the contract, if these allegations are sustained by satisfactory proof.

FRAUDULENT CONVEYANCES—RECITAL OF CONSIDERATION IN DEED AS EVIDENCE—BURDEN OF PROOF AS TO CONSIDERATION AND FRAUD.—If a creditor of a grantor files a bill in chancery, in which he attacks a deed made by the grantor as being voluntary and fraudulent, the recitals of the deed, showing that the grantee paid the grantor a valuable consideration, are not evidence against the creditor of such payment. The burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee; but the burden of proving that the deed was fraudulent in fact is upon the creditor.

FRAUDULENT CONVEYANCES—CONSIDERATION—EXISTING DEBTS—BURDEN OF PROOF.—If a creditor files a bill to set aside, as fraudulent, a deed executed by his debtor, which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money; or, if the deed was executed for the payment of existing debts, to prove the validity of such debts.

FRAUDULENT CONVEYANCES—VALIDITY OF TRANSACTION—SHIFTING OF BURDEN OF PROOF.—If a creditor files a bill, attacking a transfer of property made by his debtor as fraudulent, with intent to hinder, delay, and prevent the plaintiff from recovering his debt, the burden of proving fraud ordinarily rests upon the plaintiff, but circumstances may exist which will relieve him from this burden, and cast upon the party upholding the transaction the burden of showing its validity.

FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES—CONSIDERATION AND GOOD FAITH—BURDEN OF PROOF.—If a person against whom a suit is pending, and against whom a judgment is about to be taken, transfers his entire property, real and personal, including his home, to his nephew, such circumstances are indications of a fraudulent intent, especially if the uncle and his nephew are on intimate business relations. Hence, if a creditor of the grantor attacks the conveyance as fraudulent, the burden of proving the payment of a consideration and the bona fides of the transaction is cast upon the uncle and his nephew.

FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES—QUANTUM OF PROOF.—If a conveyance of property

From an uncle to his nephew is attacked upon the ground that it is fraudulent as to creditors, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction, than if they were strangers.

FRAUDULENT CONVEYANCES—FRAUD OF GRANTOR—PROOF OF CONSIDERATION BY GRANTEE.—A grantee need not prove the payment of a consideration until the fraudulent intent of the grantor is shown, but when that is shown it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power.

Bill by J. P. Butler against J. F. Thompson to set aside a fraudulent conveyance. The bill was dismissed and the complainant appealed.

W. B. Maxwell and C. O. Strieby, for the appellant.

Dayton & Dayton and Fred O. Blue, for the appellee.

661 ENGLISH, J. On the twenty-seventh day of December, 1892, J. P. Butler obtained a judgment against John F. Thompson for the sum of four hundred and ten dollars and sixty cents, before a justice of the peace of Tucker county, on which an execution was issued and placed in the hands of a constable, and returned by him, "Money not made, and no property found." Said Butler thereupon filed his bill in the circuit court of said county, alleging therein that at the time he brought his suit before the justice said Thompson owned a very valuable shingle and board mill worth about fifteen hundred dollars situated in said county, and also owned another sawmill worth about one thousand dollars situated in the town of Davis, and other valuable personal property, such as saw logs, shingles, boards, lath, and other lumber, and lumbermen's tools, of the probable value of two thousand dollars; and, in addition to said property, Thompson and his wife were joint owners of a valuable house and lot in the said town of Davis, known as lot No. 805 on the plat of said town; that, during the pendency of said suit before the justice, Thompson, on the 15th of December, 1892, pretends to have sold the whole of said property to his nephew, Frank E. Thompson, receiving six hundred dollars cash for said house and lot in Davis; that he is not informed what said F. E. Thompson claims to have paid for said personal property, but that he now claims 662 the whole thereof by the terms of his purchase; that the pretended transfer of said property, which was intended to cover all the property, both real and personal, owned by said John F. Thompson, was made for the purpose of hindering, delaying, and defrauding the

creditors of said J. F. Thompson, and especially for the purpose of defrauding the plaintiff, and that said Frank E. Thompson had full notice and knowledge of his fraudulent intent and assisted and participated therein, and is now endeavoring to assist in the consummation of said fraudulent intent, and is endeavoring to prevent the plaintiff from recovering the amount of his said judgment; that J. F. Thompson and his family yet have possession of the house, and occupy the same, which was conveyed to F. E. Thompson as aforesaid; that said J. F. Thompson still manages and controls as his own the mills and personal property transferred by him to F. E. Thompson, and, so far as any visible sign of change of ownership goes, there has been none, except that F. E. Thompson claims the property as his, and J. F. Thompson claims to have sold the same; that, in their hurry to make transfers of all the property owned by said J. F. Thompson, a one-seventh interest in lot No. 20 in Davis was overlooked, and said J. F. Thompson is the owner thereof, as shown by deed from S. Maud Thompson to said J. F. Thompson and others; that the plaintiff caused his said judgment to be promptly docketed in said county, and the same is a lien upon the one-seventh undivided interest in said lot No. 20; that the rents and profits of the interest of said J. F. Thompson in lot No. 20 would not satisfy plaintiff's judgment in five years; that there are no other liens by judgment or otherwise against said lot No. 20, and no reference would be necessary to ascertain the liens and priorities; that no part of said judgment has even been paid; and he prayed that the interest of John F. Thompson in said lot might be sold to satisfy said lien, and, in case it did not sell for enough to satisfy said judgment and costs, that then the deed from John F. Thompson and wife to Frank E. Thompson be annulled, set aside, and canceled as fraudulent as to the one-half interest of said J. F. Thompson therein, and that the pretended sale and transfer of his personal property ⁶⁶³ to Frank E. Thompson be set aside as fraudulent, the interest of J. F. Thompson in said lot sold, and F. E. Thompson required to account for the value of said personal property, or a sufficient amount to satisfy the plaintiff's demands and costs. The defendant, J. F. Thompson, answered the plaintiff's bill, suggesting that he should amend it and make the Davis Hardware & Furniture Company, a corporation, an additional party, for the reason that, at the time the lot mentioned in plaintiff's bill as No. 20 in Davis was purchased by respondent and six others, it was the purpose and

intention of said parties to form said corporation for the purpose of carrying on a mercantile business, and respondent and six others were the promoters of said corporation, and said lot was purchased by them for said corporation before the charter was granted; that it was paid for by the promoters, but as soon as said charter was granted the same was, by verbal contract, turned over to said corporation, and said promoters were paid for their outlay in purchasing it; that said corporation took possession of said lot and improved it by the erection of valuable buildings thereon, and from that time, long before the recovery of plaintiff's judgment, said property has been in possession of said corporation, and respondent has no interest therein; that the conveyance to respondent and six others was nothing but a trust for said corporation; that the possession and notorious claim of title by said corporation to the property was notice to said plaintiff, and no decree can be entered in this case affecting said property until said corporation is made a party. At February rules, 1894, the plaintiff filed an amended bill making said corporation a party, and repeated his allegation as to his being a creditor of said John F. Thompson, and his right to have his interest in said land subjected to sale to satisfy his judgment; and alleged that, while it might be true that said real estate was purchased for and intended to be used by said corporation, it was never the intention that said real estate was to be conveyed to said corporation, but was intended to be held by the grantees; that while the agreement to form said corporation was made March 21, 1892, and recorded the 24th of March, the certificate was issued on April 2, and recorded May 11, 1892, and the deed to J. ⁶⁸⁴ F. Thompson and others was acknowledged on the same day and was not delivered for more than forty days thereafter, and was not recorded until June 22d, and said J. F. Thompson has never conveyed his interest in said land to said corporation, and he has the right to have the same sold to satisfy his judgment. Said corporation filed its answer denying that J. F. Thompson had any interest in said lot No. 20, and adopted the answer of J. F. Thompson thereto; and J. F. Thompson, in his answer to said amended bill, claimed that he made a bona fide sale to Frank E. Thompson for the purpose of paying his debts, and offered plaintiff his pro rata share, which he declined to receive; denied any interest in said lot, and claimed that he was only a trustee for said company. Frank E. Thompson also answered, denying the allegations of the bill as to himself, and denying that J. F. Thomp-

son remained in possession of the property after the sale to him. These answers were replied to generally, depositions were taken on behalf of the defendant, J. F. Thompson, and on March 14, 1895, the cause was heard, and the bill dismissed. The plaintiff obtained this appeal.

The only error assigned is as to the action of the court in dismissing the bill, which assignment is comprehensive and involves an examination of the entire case. Let us inquire first as to the right asserted by the plaintiff to subject the undivided one-seventh of lot No. 20 in the town of Davis to sale to satisfy his judgment. It appears from the testimony that the defendant, J. F. Thompson, and six others, promoters of a contemplated corporation chartered under the name of the Davis Hardware & Furniture Company, shortly before the same was chartered, purchased said lot No. 20 for the use of said corporation, and a place on which it might erect such buildings as were needed in the transaction of its business, and they received the title merely as trustees for said corporation, and that, some time before the plaintiff's suit was brought or his judgment obtained, the parties thus having acquired the title and holding said lot by verbal contract turned the possession of said lot over to said corporation, and sold the same to it. This corporation at once paid for the lot and erected improvements upon it, and has been in open, notorious, ~~and~~ and exclusive possession of it ever since. Although the contract was verbal, it was fully performed on the part of the corporation, and it had the right to call for a deed, the defendant and those who jointly hold the title being merely trustees. Now, as between the appellant and the Davis Hardware & Furniture Company, the law appears to be clearly and definitely settled in the case of *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670, where the court held that: "A purchaser of land by parol contract which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity has an equitable right in said land so purchased which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor." The same is held in the case of *Pack v. Hansbarger*, 17 W. Va. 313, syllabus. Now, as to what is required to entitle a party to specific performance this court held in the case of *Vickers v. Sisson*, 10 W. Va. 12, that "where a plaintiff files his bill for the specific performance of a verbal contract for the purchase of land, setting forth specifically the contract, the amount of the purchase money, and that the same

had been paid to the vendor, that the plaintiff was in possession of said land at the time of the purchase, and had made valuable improvements thereon upon the faith of said contract, these allegations, if sustained by satisfactory proof, will entitle the purchaser to a specific performance of the contract in a court of equity, notwithstanding the statute of frauds." These rulings, applied to the facts disclosed by the record in this case, lead me to conclude that the plaintiff had no right to have said lot No. 20 subjected to sale in satisfaction of his judgment.

Let us now consider the other transaction, which the bill charges to be fraudulent in this: That the transfer of the property in the bill mentioned and described as a valuable shingle and board mill worth about fifteen hundred dollars, situated in the town of Bretz, in said county, another mill worth about one thousand dollars in the town of Davis, and other valuable personal property therein described worth about two thousand dollars, also a house in the town of Davis on lot No. 305, held jointly by said J. F. Thompson and his wife, was made with intent ~~etc~~ to hinder, delay, and defraud the creditors of the defendant, J. F. Thompson, and especially to hinder, delay, and defraud the plaintiff. In determining a question of this character we must look to the facts and circumstances immediately surrounding the transaction, and in doing so we find the plaintiff's action before the justice was instituted on the 10th of December, 1892, the summons was made returnable to the 17th, and appears to have been served upon the defendant, J. F. Thompson, who appeared, and the case was continued until the 27th by consent. On December 15, 1892, J. F. Thompson and wife conveyed to his nephew, Frank E. Thompson, in consideration of six hundred dollars by their deed of that date, lot No. 405 in the town of Davis, on which was J. F. Thompson's dwelling-house, which deed was put on record on the 17th of December, the day said case was continued. Now, it must be regarded as somewhat singular that after the plaintiff's suit was brought before the justice, and on the very day to which the process was returnable, the defendant, J. F. Thompson, should be seized with a sudden inclination to dispose of all his property, real and personal, even the roof over his head, with a view of paying off all his debts; and he alleges in his answer that he offered to pay the plaintiff his pro rata share, but the plaintiff declined to receive it. This answer was replied to generally, and the allegation is unsustained by proof. As to the payment of a valuable consideration by the grantee where the

deed is attacked by a creditor as voluntary and fraudulent, several decisions of this court have announced the doctrine as follows: "Where the creditor of a grantor assails in a chancery suit a deed made by a grantor as voluntary and fraudulent, the recitals of the deed that the grantee had paid the grantor a valuable consideration are not evidence against a creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor": See *Rogers v. Verlander*, 30 W. Va. 619; *Cohn v. Ward*, 32 W. Va. 34; *Childs v. Hurd*, 32 W. Va. 100; *Himan v. Thorn*, 32 W. Va. 507. It has also been held in this state that where a creditor ⁶⁶⁷ files a bill to set aside as fraudulent a deed executed by his debtor which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money, or, if the deed was executed for the payment of existing debts, to prove the validity of such debts: See *Knight v. Capito*, 23 W. Va. 639. Now, the defendant, F. E. Thompson, in his answer alleges that the purchases were made by him in good faith for a full and complete consideration, and without fraud or fraudulent intent. The general replication, however, puts this in issue, and there is no proof to sustain it; and, besides, as we have seen, the burden of proof in the circumstances of this case as to the payment of the purchase money is on the grantee; yet neither he nor his uncle takes the stand as a witness to support the allegation. It is alleged in the bill, and not denied by the answers, that on the 15th of December, 1892, J. F. Thompson sold the whole of his property to his nephew Frank E. Thompson. The defendant, J. F. Thompson, in his answer admits that he sold all his property, real and personal, but says affirmatively, by way of excuse, that he was indebted to certain creditors in the north, and, being anxious to pay them, he sold his interest in said lot and personal property to F. E. Thompson, a man of large means then extensively engaged in the lumber business, for a full consideration; but, so far as the proof goes, there is nothing to show that J. F. Thompson owed a dollar except to plaintiff; neither is there a particle of evidence to show that said F. E. Thompson was worth a cent or that he ever paid any consideration for the property. In the case of *Goshorn v. Snodgrass*, 17 W. Va. 717, it was held that "if the facts established afford a sufficient and reasonable ground for drawing the inference of

fraud, the conclusion to which the proof tends must, in the absence of explanation or contradiction, be adopted"; also that "though the proof of fraud rests on the party who alleges it, circumstances may exist to shift the burden of proof from the party impeaching the transaction onto the party upholding it." Speaking of relationship, Bump on Fraudulent Conveyances, section 67, says: "Relationship is not a badge of fraud. Fraud, however, is generally ~~ess~~ accompanied with a secret trust, and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. Consequently, relatives are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has confidential relations. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain, or gives color to the transaction." And, in enumerating the relations to which the doctrine applies, uncle and nephew are mentioned, and he adds: "Whenever this confidential relation is shown to exist, the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction." The same author (section 50) says: "The expectation or pendency of a suit is a badge of fraud, because a transfer tends to deprive the creditor of the means of enforcing his judgment when he obtains it. If an attorney who holds a claim for collection is induced to delay the institution of a suit at the request of the debtor, who thereupon takes advantage of the delay to make a conveyance, this is a badge of fraud the same as if the suit were actually pending. The pendency of a suit, however, is merely a badge of fraud." In the case under consideration the suit was pending, and on the 17th of December was continued by consent, and on that day the deed was recorded. As we have seen, the pendency of the suit at the time of the conveyance was a badge of fraud. Bump on Fraudulent Conveyances, section 66, says: "The grantee need not prove the payment of the consideration until the fraudulent intent of the grantor is shown, but, when that is shown, it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power. . . . The facility with which a fictitious payment may be fabricated renders it necessary for him to produce all the proof which may reasonably be supposed to

be in his power of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud." As to notice of fraudulent intent on the part of the grantee ^{see} the same author says in section 184, page 212: "If the grantor and grantee are relations or are intimate, this is a fact from which it may be inferred that the latter knows the former's financial condition": Citing *Castro v. Illies*, 22 Tex. 480, 73 Am. Dec. 277. In the case of *Herzog v. Weiler*, 24 W. Va. 199, it appears that an insolvent husband transferred to his wife's brother for an alleged valuable consideration all of his personal property. Soon afterward the brother transferred the said property to another brother, and the latter transferred it to his sister, the wife of said insolvent husband, as a gift in consideration of fraternal affection. In a controversy between the wife and the husband's creditors to have said property subjected to the payment of debts contracted by the husband before the transfer by him, the court held that "the burden of proving the transfer by the husband to the brother was bona fide and for a valuable consideration rests upon the wife." The circumstances immediately surrounding this transaction—the pendency of the suit, the relationship of the grantee, the transfer of the entire property, real and personal, including the home of the grantor, when a judgment is about to be taken against him—are indications of a fraudulent intent. The near relationship or business relations of the grantee with the grantor are such as to cast the burden of proving the payment of consideration and the bona fides of the transaction upon said J. F. Thompson and his nephew Frank E. Thompson, and yet neither of them came forward as a witness to sustain the transaction or show that a valuable consideration was paid. These circumstances, in my opinion, stamp the sale of said house and lot No. 305 and personal property as fraudulent, and induce me to hold that the conveyance and transfer of them were made with intent to hinder, delay, and defraud the plaintiff in the collection of his debt, and that they are therefore void as to the plaintiff's judgment. The decree of the circuit court dismissing the plaintiff's bill is therefore reversed, and the cause remanded.

VENDOR AND PURCHASER—VERBAL CONTRACT FOR SALE OF LAND.—The purchaser under a contract for the sale of real estate is the equitable owner of the property: *Elliott v. Ashland etc. Ins. Co.*, 117 Pa. St. 548, 2 Am. St. Rep. 708; *Burke v. Johnson*, 37 Kan. 337, 1 Am. St. Rep. 252.

SPECIFIC PERFORMANCE—VERBAL CONTRACT FOR SALE OF LAND.—An agreement to purchase land, with payment

of the purchase money, gives an equitable title which a court of chancery will enforce: *Whitbeck v. Whitbeck*, 9 Cow. 266, 18 Am. Dec. 503. A part performance of a verbal contract for the sale of land takes the contract or sale out of the statute of frauds: *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535; and warrants specific enforcement where there has been delivery with acts of ownership on both sides: *Parrill v. McKiuley*, 9 Gratt. 1, 58 Am. Dec. 212. But in bills for specific performance the contract laid must be clear and satisfactory as to the description of the land, the amount of the purchase money, and time of payment, and the proof must be equally clear and satisfactory: *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45. A parol contract for the sale of land will not be specifically enforced unless it is clear, definite, and certain: *Note to Metcalf v. Hart*, 31 Am. St. Rep. 169.

FRAUDULENT CONVEYANCES—RECITALS OF CONSIDERATION AS EVIDENCE.—Although a conveyance may recite a valuable consideration, if the recital is not true in fact, there can be no inquiry into the good faith of the grantee, and the fraud of the grantor must be visited on him: *Note to Huggins v. Perrine*, 68 Am. Dec. 133. Want of consideration in a deed may be shown, notwithstanding a recital thereof, in connection with, and as a part of, the fraud which is charged in obtaining the deed: *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF—CREDITORS.—One who asserts a fact must ordinarily assume the burden of proving it. The burden is generally on the party holding the affirmative: *Note to Snyder v. Grandstaff*, 70 Am. St. Rep. 872. When a conveyance made by a debtor is attacked by his creditors as fraudulent, the burden of proof is first upon them to show the intent of the grantor to defraud: *Note to State v. Mason*, 34 Am. St. Rep. 402; *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 42 Am. St. Rep. 756; *Simmons v. Shelton*, 112 Ala. 284, 57 Am. St. Rep. 39.

FRAUDULENT CONVEYANCES—PROOF OF CONSIDERATION—BURDEN—GRANTEE.—One claiming to be a bona fide purchaser from a fraudulent grantor has the burden of proof to establish his claim: *Connecticut etc. Life Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656. If a deed is attacked for fraud, the grantee, in order to prove himself a bona fide purchaser, must show that he paid a valuable consideration: *Weber v. Rothchild*, 15 Or. 385, 3 Am. St. Rep. 162; *Wooten v. Steele*, 109 Ala. 563, 55 Am. St. Rep. 947.

FRAUDULENT CONVEYANCES—SHIFTING OF BURDEN OF PROOF.—After the fraudulent intent of a grantor is shown, the onus of proof shifts to the purchaser to show that he, in good faith, paid a valuable consideration. The burden of setting aside a conveyance made by a debtor as being executed with intent to hinder, delay, or defraud creditors is, of course, in the first place, on the attacking creditor; but, when the fraudulent intent on the part of the grantor is shown, and the circumstances are suspicious, then the purchaser must prove that he paid full value, and then the attacking creditors must make it appear that the purchaser had knowledge of the fraud at the time of the conveyance: *Note to State v. Mason*, 34 Am. St. Rep. 402. When a fact is peculiarly within the knowledge of a party, he must produce the necessary evidence to prove it; *Weber v. Rothchild*, 15 Or. 385, 3 Am. St. Rep. 162. For a rule as to the classification of fraudulent conveyances, concerning the burden of proof, see *Brown v. Mitchell*, 102 N. C. 847, 11 Am. St. Rep. 748.

FRAUDULENT CONVEYANCES — BADGES OF FRAUD — RELATIONSHIP—PENDING SUIT.—It is a badge of fraud for an

insolvent debtor to sell his property pending a suit against him; but it is a much stronger badge when the purchaser is a creditor, and he buys, not only in extinguishment of his own debt, but the debts also of other favored creditors, and not only property sufficient to discharge these demands, but a large surplus over: *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368. The mere fact of relationship between the parties to a transfer cannot be resorted to as a badge of fraud, where the conduct of the party receiving the transfer is consistent with fairness and honesty; otherwise, it may be considered a badge of fraud: *Note to Hanson v. Bean*, 38 Am. St. Rep. 519.

JONES v. SHUFFLIN.

[45 WEST VIRGINIA, 729.]

APPEAL—WHAT CANNOT BE URGED ON, FOR THE FIRST TIME.—An objection that a bill in chancery was not signed by an attorney cannot be taken for the first time in the appellate court.

REAL PROPERTY—EXPIRATION OF LIFE TENANCY—RIGHT TO IMPROVEMENTS.—A REMAINDERMAN, in case of a life tenancy, is entitled to the property, with all improvements thereon, at the expiration of the tenancy.

REAL PROPERTY—IMPROVEMENTS—AGREEMENT BETWEEN TENANT FOR LIFE AND LESSEE DOES NOT BIND REMAINDERMAN.—The rule that fixtures erected by a tenant must be removed during the term is applied strictly as between a tenant for life, or his lessee, and the remainderman, for the latter is not bound by any agreement between the tenant for life and his lessee under which the lessee may have erected buildings on the land.

REAL PROPERTY—IMPROVEMENTS ON ANOTHER'S LAND AS PART OF THE REALTY.—If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste.

REAL PROPERTY—LEASE OF TOWN LOT BY TENANT FOR LIFE TO ANOTHER—RIGHT OF LESSEE TO REMOVE IMPROVEMENTS AFTER TENANT'S DEATH.—When a life tenant has leased to another person a town lot used only for building purposes, the lease, though unexpired, terminates with the death of the life tenant. Hence, the lessee cannot, after that time, remove buildings erected by him on the lot, without the consent of the remainderman, during the continuance of the tenancy and lease, as such buildings are a part of the realty and go to the remainderman.

Bill by Clara E. Jones against M. B. Shufflin. There was a decree for the plaintiff and the defendant appealed.

Thomas P. Jacobs and F. D. Young, for the appellant.

Robert McEldowney and G. M. McCoy, for the appellee.

729 DENT, J. S. Stephens and Amanda Stephens, holding

a life tenancy in a certain lot in the town of Sistersville, Tyler county, West Virginia, with remainder in Clara E. Jones, leased the same to M. B. Shufflin for a period of years extending to the first day of April, 1900. Clara E. Jones did not consent to or join in either of these leases (there being two of them), but, on being applied to, positively refused to do so. To the ⁷³⁰ first lease Mrs. J. S. Jones (now Mrs. Shufflin) was a party, but she was not made a party to this suit. These leases were terminated by the death of the surviving life tenant, Mrs. Amanda Stephens, the second day of January, 1897; See *Shufflin v. House*, 45 W. Va. 731, post, p. 851. During their existence M. B. Shufflin erected a large frame building on the lot which he leased to House & Hermann who were in the occupancy thereof at the time the leases terminated. This building was constructed on a good, firm foundation, and was connected with the street sewerage, at the expense of the life tenancy. Defendant Shufflin undertook, after the termination of his lease aforesaid, to remove the building from the lot. Clara E. Jones, plaintiff, enjoined such removal, and, at the hearing of the cause on bill and answer, general replication, and depositions, the injunction was perpetuated. The defendant appeals, and claims: 1. That the bill was not signed by an attorney. This is an objection that should have been taken in the circuit court, and cannot be taken for the first time in this court; 2. That Mrs. J. S. Jones was not made a party, while she is a party to the leases, or one of them. There is nothing to show that she was attempting to remove the building, and it will be time enough to enjoin her when she does undertake to do so. She was not a necessary party, as no relief is sought against her.

Defendant insists he had a right to remove the building: 1. Because his tenancy had not terminated; and 2. It remained his by virtue of the law of fixtures. The first of these questions is settled adversely to defendant's claim in the case of *Shufflin v. House*, 45 W. Va. 731, before cited. As to the second question, the law is well settled that the remainderman is entitled to the property with all improvements thereon at the expiration of the life tenancy. In the case of *White v. Arndt*, 1 Whart. 91, it is held: "1. Even as between landlord and tenant, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term; after the expiration of the term the tenant can neither remove them nor recover their value from the landlord; 2. This rule prevails more strictly between tenant for life or his lessee and the remainderman, the latter

of whom is not bound by any agreement between the ~~ten~~ tenant for life and his lessee under which the lessee may have erected buildings on the land": *Haflick v. Stober*, 11 Ohio St. 482; *Austell v. Swann*, 74 Ga. 278; *Dean v. Feely*, 69 Ga. 804. The plaintiff, being entitled to the remainder, and not having consented to the lease, is in no wise bound thereby, and the improvements come to her as though they had been placed thereon by a stranger. If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste: *Bonney v. Foss*, 62 Me. 248; *Cannon v. Copeland*, 43 Ala. 252; *Dart v. Hercules*, 57 Ill. 446; *Honzik v. Delaglise*, 65 Wis. 494, 56 Am. Rep. 634. The defendant in this case acted with open eyes. He erected the building against the consent and against the known will of the plaintiff. He allowed it to remain until after the expiration of the life tenancy and the termination of his lease, and thereby, if he might have done so before, he cannot remove the same. It has become a part of the realty, and belongs to the plaintiff. The court did right to perpetuate the injunction, and its decree is affirmed.

APPEAL—WHAT CANNOT BE FIRST ASSERTED ON.—A question not raised at the trial will not be considered for the first time on appeal: *Note to New South Bldg. etc. Assn. v. Reed*, 70 Am. St. Rep. 863.

IMPROVEMENTS ON ANOTHER'S LAND—LIFE TENANT—REMAINDERMAN.—A tenant for life cannot charge either the remainderman or the estate for improvements on the land in which he holds the life estate: *Note to Williamson v. Jones*, 64 Am. St. Rep. 921.

IMPROVEMENTS ON ANOTHER'S LAND BECOME A PART OF THE REALTY, WHEN.—Improvements of a permanent character made upon land, and attached thereto, without the consent of the owner, by one having no title or interest, become a part of the realty, and vest in the owner of the fee without reimbursement from him: *Note to Jones v. Hoard*, 43 Am. St. Rep. 19. The general rule is that a house erected on the land of another becomes a part of the realty: *Note to Dutton v. Ensley*, 69 Am. St. Rep. 343.

IMPROVEMENTS ERECTED BY TENANT—RIGHT OF REMOVAL.—Some cases hold that a tenant who has erected buildings, even for the purposes of trade, upon the demised premises, has a right to remove them at or before the end of his term, but not afterward: *Note to Daniels v. Brown*, 69 Am. Dec. 516.

SHUFFLIN v. HOUSE.

[45 WEST VIRGINIA, 781.]

LANDLORD AND TENANT—HOLDING TO END OF YEAR—"LAND"—TOWN LOT—CONSTRUCTION OF STATUTE.—The word "land," in a statute which provides that if there is a tenant for life, or other uncertain interest in land which is let to another, "the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor," is used in a restricted sense to denote farming or agricultural land, rented for an annual rental, and does not apply to town lots used only for building purposes.

LANDLORD AND TENANT—TOWN LOT—LEASE OF—DEATH OF LIFE TENANT—TERMINATION OF LEASE.—All unexpired leases made by a life tenant terminate at his death, except as otherwise provided by statute. Hence, an unexpired lease given by a life tenant to another person, on a town lot used only for building purposes, terminates with the death of the life tenant, and does not run, under the statute of West Virginia, "to the end of the current year of the tenancy," as it would in the case of agricultural or farming lands. Therefore, the rent for what is left of the term belongs to the remainderman, and not to the life tenant's lessee, who has sublet the premises.

Suit by M. B. Shufflin against House & Hermann and others. There was a judgment for the plaintiff and the defendants sued out a writ of error.

Robert McEldowney, George W. McCoy, and Howard & Handlan, for the plaintiffs in error.

T. P. Jacobs and F. D. Young, for the defendant in error.

732 DENT, J. S. Stephens and Amanda Stephens, holding a life tenancy in a certain lot in the town of Sistersville, Tyler county, West Virginia, with remainder in Clara E. Jones, leased the same to M. B. Shufflin for the period of from one to five years, ending on the twelfth day of May, 1897. This lease was afterward extended to the first day of April, 1900. Clara E. Jones did not consent to, or join in, either of the leases. Amanda Stephens, the surviving life tenant, died the second day of January, 1897. In the meantime M. B. Shufflin sublet the property to House & Hermann at the rate of one hundred and fifty dollars. House & Hermann paid Shufflin up to including the date of the death of Mrs. Stephens, and then released the property from Mrs. Jones. Shufflin, claiming the rent from Mrs. Stephens' death up to the end of the current year, to wit, the 12th of May, 1897, levied two distress warrants on the property of House & Hermann. They gave forthcoming bonds, and this suit is on such bonds to recover the balance

of such rent. The circuit court gave judgment against the defendants for the sum of three hundred and sixty dollars, and they come to this court.

The only question presented is as to whether M. B. Shufflin or Clara E. Jones is entitled to the rent from the second day of January, 1897, to the twelfth day of May, 1897, being from the date of the death of Mrs. Stephens to the end of the ⁷³³ current year of the leasehold. All unexpired leases made by a life tenant terminate at his death, except as otherwise provided by statute: Gear on Landlord and Tenant, sec. 21; 1 Taylor on Landlord and Tenant, sec. 112, p. 421; 12 Am. & Eng. Ency. of Law, 758, note 1. Code, chapter 94, section 1, provides that: "If there be tenant for life or other uncertain interest in land which is let to another, the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor; the rent, if it be reserved in money, shall be apportioned between the tenant for life or other uncertain interest, or his personal representative and those who succeed to the land." This provision the plaintiff insists governs in this case, while the defendants insist that it only applies to land used for agricultural purposes, and not to town lots or other real estate where the rent is payable in money. The word "land" in this section was no doubt used in a restricted sense to denote agricultural land rented for an annual rental, for the purpose of encouraging agriculture and securing to the tenant the harvest that he might sow: 2 Minor's Institutes, 101, 102. Where the reason of the law fails, the law itself is at an end. "The word 'land' has two senses; one is general and one restricted. If it occurs accompanied with other words which either in whole or in part supply the difference between the two senses, that is a reason for taking it in its less general sense; e. g., in a grant of lands, meadows, and pastures, the former word is held to mean only arable land: Burton on Real Property, 183; Cro. Eliz. 476, 659; 2 Anderson's Law Dictionary, 123; Van Gorden v. Jackson, 5 Johns. 440"; Bouvier's Law Dictionary. The reason for taking the word "land" in its less general sense as farming or agricultural land is from the context and the true purpose of the enactment, being to secure to the person who sows and cultivates the right to reap and enjoy. In the case of town property no such necessity exists. If the statute was applicable, all the tenant could do, even thereunder, would be to collect the rent and pay it over to the remainderman. He is only entitled to the rent up to the date of the death of the life tenant. Why,

then, permit him to collect rent which belongs to another, or retain control of property in which he has no possible interest? With agricultural land it is different. A yearly rental or ⁷²⁴ a portion of the crop is usually reserved, and according to common law the subtenant, in case of the death of the life tenant, was entitled to the emblements. The object of the statute was to declare the common law and make it effective, and was in no sense to apply to town property rented for a monthly rental, of whatever term. As to such property its provisions have no application, and are wholly unnecessary and useless. Therefore the circuit court erred in rendering judgment for the plaintiff, and the same is reversed, and judgment is entered for the defendants.

LANDLORD AND TENANT—TERMINATION OF LEASE BY DEATH OF LIFE TENANT.—A lease made to another by a life tenant is terminated by the death of the latter, though the term of the lease has not expired: *Jones v. Shufflin*, 45 W. Va. 729, ante, p. 848.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ESTATE OF COLE.

[102 WISCONSIN, 1.]

MUNICIPAL CORPORATIONS—TAXPAYER'S RIGHT TO ACT FOR.—A taxpayer, acting on behalf of himself and others, has the right to enforce the cause of action of a municipal corporation, of which he is a member, when its officers neglect or refuse to perform their duty.

MUNICIPAL CORPORATIONS—RIGHT OF TAXPAYER TO TAKE APPEAL ON BEHALF OF.—The test of the right of a taxpayer, who is a member of a municipal corporation, to take an appeal from the determination of the trial court in a matter pending therein, by which the corporation is aggrieved, and from which its proper officers refuse or neglect to take such appeal, is not whether the taxpayer is directly injured by the determination of the trial court, but whether the corporation, as a whole, is injured in a matter in which the individual members thereof have a substantial interest.

TRUSTS—REPAIRS AND IMPROVEMENTS—PAYMENT FOR.—Trustees to whom real property is conveyed by will to hold for the lives of certain persons in being, the income to be used, as far as necessary, to keep the property in repair and pay taxes and insurance, the balance to be paid to those having a life interest, and the corpus, at the termination of the life estate, to be conveyed to a municipality in trust, are not entitled, without express authority, to make permanent repairs or improvements on the property and to pay for them out of the corpus of the property, even with the consent of the municipality and those having such life interest, when the income from the property is ample to preserve it for the ultimate purposes named in the will.

COSTS IN ACTIONS TO ENFORCE TRUSTS, if allowed against the trustees, are payable out of the trust fund, unless the court otherwise directs because of bad faith on the part of such trustees.

COUNSEL FEES TO PERSONS INTERESTED IN A TRUST fund are not recoverable in an action to enforce the trust, either from the trustees personally or out of such fund.

J. W. Cole died testate, February 17, 1894. By his will he bequeathed to his three executors the bulk of his property, in trust to manage and control it during the life of his wife and son, the income therefrom to be used, so far as necessary, to keep the property in repair and to pay the taxes and insurance, and the balance to be paid those having a life interest in the property, and the corpus of the property to be, at the termination of such life interest, conveyed to a municipal corporation in trust. The trustees, after the death of Cole, made repairs and permanent improvements which the income of the property was ample to pay. The trustees, however, made an agreement between themselves, the parties having the life interest, and the officers of the municipality to the effect that a portion of the trust estate, known as the homestead, should be sold, and the proceeds used to reimburse the trustees for money paid out for funeral expenses, debts, and taxes due at the death of the testator, and for permanent repairs and improvements made, or that might be made, upon the property. Such proceedings were thereafter had that the homestead was sold under an order of the county court, and the proceeds were applied to the payment of the claims of the trustees. At such hearing, the defendant, Mulberger, a citizen and taxpayer of the city, on behalf of himself and others, filed objections to the proceedings on the ground that the sale of such homestead was unauthorized and that no part of the proceeds thereof could properly be applied in payment of either the executors' account for the settlement of the estate, or for the improvements upon the property. Such taxpayer took an appeal from the determination of the county court to the circuit court, where the judgment of the county court was reversed, and the court determined that the whole proceeds of the sale of the homestead belonged to the trust estate to be invested for the benefit of those having a life interest therein, and thereafter to be turned over to the municipality as provided in the will. Defendants appealed.

L. B. Caswell and W. H. Rogers, for the appellants.

H. Pease, for the respondent.

* MARSHALL, J. Appellants contend that respondent had no right to take the appeal from the county court to the circuit court, and that the latter erred in not dismissing it on appellants' motion. The statute (Rev. Stats., sec. 4031) is referred to, giving the right of appeal in such cases only to the party aggrieved, and numerous cases are cited to the effect

that only a person having a substantial or pecuniary interest in the matter is a party aggrieved within the meaning of the statute. It is unnecessary to discuss that question at any considerable length. It is sufficient to refer to the reasoning in many cases recently decided by this court as to the right of a taxpayer to enforce the cause of action of a public corporation of which he is a member when its officers neglect or refuse to perform their duty: *Quaw v. Paff*, 98 Wis. 586; *Frederick v. Douglas Co.*, 96 Wis. 411; *Land etc. Co. v. McIntyre*, 100 Wis. 245, 258, 69 Am. St. Rep. 915; *Rice v. Milwaukee*, 100 Wis. 516; *Webster v. Douglas Co.*, 102 Wis. 181, post, p. 870.

The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose is not personal and direct to himself, but to the corporation. The question is, Are the members of the corporation as a whole aggrieved? If so, rather than that justice shall fail, the court will take jurisdiction of the subject of controversy at the instance of a taxpayer. The fact that the threatened injury or the wrong done is to the corporation, and that its governing body or officers, who should move in the matter, neglect or refuse to do so, creates a necessity for some other way to remedy the mischief, and in that situation the circumstance of a person being a taxpayer and interested in the protection of its rights is a sufficient test of his competency to challenge the threatened wrong, or wrong actually done, in a court of justice. That jurisdiction of the court is the most powerful and effective force to prevent and redress wrongs to public corporations when their officers squander public money or improperly surrender or violate public rights, either corruptly or ignorantly. There is no other way to successfully and efficiently meet that situation. In such cases, where officers neglect to do ^s their duty, the wrong need not by any means go unredressed so long as there is a single taxpayer with courage and public spirit enough to set the judicial machinery in motion. He may stand in court in place of the unfaithful public officials. The court, in him, will recognize the interests of the corporation as a whole, and, with the evidence produced before it calling for action, by its decree compel the performance of duty by all within its reach.

No man or set of men can wrong a public corporation in Wisconsin and defy its members, by means of sustaining such relations with the individuals of its governing body as to deter them from properly protecting the public rights, or their failing to do it from any other cause. Such has been found to be the

situation in some states at some times, as indicated in *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, but not here. The subject is not governed by any statute, or necessarily by precedent. As said in the case cited, the power of a court of equity, which is the jurisdiction invoked by the taxpayer, is broad enough to fit all situations where, to effect justice, a remedy is required. Where it is guided by precedents it is not governed by them, but may meet new situations as they arise, so that, in the race between it and wrongdoing by public servants in the handling of the financial affairs of the municipality, the way is open and the means ample to secure the prevalence of justice over wrong.

It will not be questioned but that the city of Watertown could have appealed from the action of the county court. That being the case, the taxpayer, within all the decisions of this court, had a sufficient interest in maintaining the corporate rights to enable him to intervene and take the appeal when the corporation would not proceed in the proper way to protect its rights.

The remaining question to be determined is, Did the trial court rightly decide that the entire expenditures made by the trustees upon the trust property were chargeable to the ⁹ income therefrom? That must be answered in the affirmative, and independently of whether the decision was strictly right as to the expenditures being all for repairs strictly so called or not. As to that, however, we see no reason for disturbing the decision of the trial court. The will clearly indicates that the entire estate received from the testator was intended by him ultimately to be conveyed to the city of Watertown for the purposes indicated therein. It devoted the income to the payment of all repairs on the buildings, and said that all of the property which came to the possession of the trustees shall at the end be conveyed to the city. There is no special power given to do anything to the buildings except to keep them in repair. As a general rule, unless such special power be expressly given to trustees, they cannot exercise it at all: *Perry on Trusts*, sec. 526; *Lewin on Trusts*, *576; *Beach on Trusts*, sec. 626, and cases cited to text in each. *Beach* states the rule thus: "Subject to certain modifications it is the rule that where real estate is conveyed to trustees in trust to a tenant for life, with remainder over, the trustees have no power to raise money out of the corpus of the estate for the purpose of making substantial and permanent repairs, either on the buildings or on the land. Such ex-

penses, if incurred, will be a charge on the interest of the tenant for life." *Nairn v. Marjoribanks*, 3 Russ. 582, is instanced to support the text, where Lord Eldon said that, even if the master should report that it would be for the benefit of all parties interested that improvements should be made, he would not confirm the report.

Some exceptions to the extreme rule stated are found in some modern decisions, in cases where the control of the property given to the trustees was of such a nature as to include by implication power to incur expenses for permanent improvements, or where it was necessary to make such improvements in order to preserve the property and make it tenantable, and there was no other way of raising the necessary ¹⁰ money to do it; but no case can be found sanctioning improvements to property at the expense of the remainderman, where power to do so is not given by the instrument creating the trust, either expressly or impliedly, or where the income from the property is ample to meet all such expenditures. In *Peirce v. Burroughs*, 58 N. H. 302, the general rule is stated thus: "The preservation of the capital without expense to the remainderman is as much his right as the use of the property without payment of rent is the right of the tenant for life; the measure of the latter is the net income for life." *Cogswell v. Cogswell*, 2 Edw. Ch. 231, is a further good illustration of the rigorous adherence to that rule by courts of equity. There a portion of the trust property consisted of buildings in such a condition as to yield but very little income, and the court said that did not justify the making of permanent improvements at the expense of the trust property, the testator having given no directions in that regard in his will. That applies very clearly to the will before us. The testator indicated clearly, as before stated, that the buildings on the property were to be put in repair, and kept in repair, out of the income until the expiration of the life interest of the wife and son, and then that the property, unimpaired as it came to the trustees, except as to character of investments changed under the terms of the will not material to this discussion, should be conveyed to the city of Watertown. There is no power in the trustees to change the plain scheme of the will, no power in the court to authorize any such change, and no power in the city of Watertown to vary it in any manner. As the testator's scheme was worked out and inscribed in the will, so must it be. The trustees must carry out that to the letter, and at the end the city of Watertown must take the estate for the purposes indicated in the will, or reject it.

It follows, as the learned trial court decided, that the agreement made by the council of the city of Watertown for the ¹¹ reimbursement of the trustees out of the trust estate for expenditures made by them upon the property was ultra vires and totally so, and, as said before, without regard to whether such expenditures were in part for permanent improvements, strictly so called, though we are inclined to say, as did the trial court, that they were all repairs within the language of the will expressly directing the application of the income of the property, so far as necessary, to the payment of all expenditures necessary to keep such buildings in a proper state of repair. That certainly includes all reasonable charges necessary to make the structures desirable as rentable property.

There is no other question that requires consideration. Some suggestion was made on the argument as to the right of the parties to have costs and counsel fees out of the estate, and as to directions for the court below to make a proper allowance for such counsel fees. It is considered that the subject of taxable costs, strictly so called, in a case like this, is wholly regulated by statute. The court below has discretionary power to allow or withhold costs as justice seems to require. If allowed against the trustees they are payable out of the trust fund, unless the court otherwise directs, because of bad faith on the part of such trustees: Rev. Stats. 1878, sec. 2932. That applies to all courts and to the reasonable counsel fees of the trustees as well as taxable costs, the latter meaning costs taxed according to the statutory fee bill. In this connection, as to the appeal to this court, we are unable to say that the appellant trustees have been guilty of such bad faith as should subject them, personally, to the expenses of such appeal. Their costs and expenses here, therefore, will be paid from the trust fund, but from that part represented by the income. Whether their expenses, including counsel fees of the litigation below, shall be likewise paid, is a matter that will be left to the court that shall further superintend the administration of the trust.

¹² In regard to granting counsel fees to the respondent, or giving directions to the lower court to do so, payable out of the trust fund, that is quite another question. There is no statute authorizing such a proceeding and no precedent for it in this court. The counsel fees of trustees, acting in good faith, and costs taxed against them as well, were always payable out of the trust fund, because of the injustice of making them bear the expense, personally, of matters done honestly, in a representa-

tive capacity. But it is considered that counsel fees to others that may be interested in the trust fund are not recoverable, either from the trustees personally or out of such fund. That was the rule in chancery before the code, and there is no statute changing it, nor any precedent varying the old practice: *Rose v. Rose etc. Assn.*, 28 N. Y. 184; *Downing v. Marshall*, 37 N. Y. 380; *Devin v. Patchin*, 26 N. Y. 441; *Lee v. Lee*, 39 Barb. 172; *Parsons on Costs*, 132. There are cases in this court for the construction of wills, and contests as to the validity of wills, where a different rule has been adopted, which we need not review here. It does not apply to this case.

An examination of respondent's brief satisfies us that there is much unnecessary matter in it. Costs for that we limit to thirty-five dollars.

By the Court. The judgment of the circuit court is affirmed, costs to be taxed and paid as indicated.

Bardeen, J., took no part.

TAXPAYER'S RIGHT TO BRING SUIT FOR COUNTY.—If a county has a plain cause of action for an injury done it, which should be enforced for the protection of its citizens or taxpayers, and its governing board refuses to assert such cause of action, any citizen, by reason of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county: *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915. Remedies of taxpayers for illegal corporate acts, when the proper municipal officers refuse to sue: See the extended note to *McCord v. Pike*, 2 Am. St. Rep. 92.

TRUSTS—REPAIRS AND IMPROVEMENTS.—Trustees invested with general powers of control and management are not bound to strict limitations; they are justified in making ordinary repairs and improvements and insuring the property, and the trust estate is liable therefor: Note to *Johnson v. Leman*, 19 Am. St. Rep. 71. As to what expenses are chargeable to the income of a trust estate and what may be paid out of the corpus of the estate, see *Wordin's Appeal*, 71 Conn. 531, 71 Am. St. Rep. 219.

HALLOCK v. YANKEY.

[102 WISCONSIN, 41.]

SURETYSHIP—RELEASE BY EXTENSION OF PAYMENT.—If the payment of a note is definitely extended in consideration of the prepayment of interest, without the knowledge or consent of a surety, he is thereby discharged from liability.

SURETYSHIP—ESTOPPEL AGAINST SURETY.—If a surety on a note, as agent for the principal debtor, requests and obtains an extension of time of payment without mentioning his liability as surety, he is estopped to assert that he is released by reason of his want of assent as such to the extension.

SURETYSHIP—EFFECT OF RELEASE OF SURETY ON COSURETY.—If one of two sureties on a note is discharged from liability by reason that the time of payment thereof has been extended without his consent, his cosurety is thereby released from liability for one-half of the amount of the note.

Action against Yankey and Hartzheim to enforce their liability as sureties on a note. The defense was that the time of payment of such note had been extended by the holder thereof without the consent of such sureties, thereby releasing them from liability. Judgment for the defendants and plaintiff appeals.

G. W. Sloan, for the appellant.

Malone & Bachhuber, and Ryan & Merton, for the respondents.

⁴³ WINSLOW, J. As to the defendant Hartzheim there can be no doubt that the verdict was rightly directed. His liability was that of a surety alone, and, upon very familiar principles of law, he was discharged if the time of payment of the note was definitely extended by a valid agreement without his consent: *Weed Sewing Machine Co. v. Oberreich*, 38 Wis. 325. Whatever may be the fact as to Hartzheim's presence at the time of the first extension of the note, it appears without dispute that the note was definitely extended in consideration of the prepayment of interest a number of times afterward, without his presence or consent. The payment of interest in advance is a sufficient consideration for the agreement of extension of time: *Batavian Bank v. McDonald*, 77 Wis. 486.

As to Yankey, however, the question is different. The evidence seems to show satisfactorily that he was the acting officer of the corporation, not only in executing and delivering the note originally, but in paying the interest in advance ⁴⁴ at the time

of each extension. There is certainly sufficient evidence to justify a jury in finding that he, in legal effect, requested each extension of time, and paid the advance interest in order to secure such extension. It is true that he made such requests and payments in his capacity as an officer of the corporation and on its behalf, and that nothing was said as to his individual liability as guarantor; and the question presented is whether, having requested and consented to the extension on behalf of the corporation, he can be heard to say that he did not thereby consent to the extension in his individual capacity as guarantor. Of course, the obligations of a surety are strictissimi juris. He may stand upon the letter of his contract. He may have knowledge that an extension has been granted to his principal, and the law does not impose on him the duty to speak: 2 Brandt on Suretyship and Guaranty, sec. 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent. How many bankers or business men would reason thus, "Yankey has consented to the extension as treasurer of the corporation, but has not consented in his individual capacity, and I must now ask him if he consents as Mr. Yankey?" We think very few would think of drawing such fine lines of distinction. After Yankey requested and procured the extension on behalf of the corporation, and gave no notice to the creditor that he did not consent to an extension in his character as surety, we think that well-known rules of estoppel must be held to prevent him from asserting that he is discharged as surety because of lack of consent. He has actively induced a change of position on the part of his creditor, which ⁴⁵ he will not be allowed to take advantage of, to his creditor's injury.

Another question here arises, namely, as to the effect of the discharge of Hartzheim upon the liability of Yankey. While his discharge is, in effect, a discharge by operation of law, still it resulted from the act of the creditor in extending the time of payment without the surety's consent; consequently, it must be given the same effect as a voluntary release: Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227. There is no doubt but that the provisions of section 4204 of the Statutes of 1898 apply to joint

sureties as well as to principal debtors, save in so far as they are limited by the proviso and by the terms of section 4205. Neither of these limitations includes the present case. Therefore the release of Hartzheim will operate to relieve his cosurety from liability for one-half of the debt, that being the proportion which Hartzheim ought to have paid as between himself and Yankey had he not been released. There must be a new trial as to Yankey, but his liability in no event can exceed one-half of the note and interest.

By the Court. As to Hartzheim, the judgment is affirmed, with costs, and as to Yankey, it is reversed, with costs, and the action is remanded for a new trial.

Bardeen, J., took no part.

SURETYSHIP—RELEASE BY EXTENDING TIME OF PAYMENT.—A surety is discharged if the creditor, by a valid and binding agreement, without the assent of the surety, gives further time for payment to the principal debtor: Note to Gillett v. Taylor, 60 Am. St. Rep. 897. But a surety knowing of and assenting to the extension of time is not discharged: Rockville Nat. Bank v. Holt, 58 Conn. 526, 18 Am. St. Rep. 293. See the extended note to Scott v. Fisher, 28 Am. St. Rep. 691.

SURETYSHIP—EFFECT OF RELEASE OF SURETY ON COSURETY.—The release of one surety operates to release other sureties on the same contract or undertaking only to the extent of his aliquot share of the whole liability: Saint v. Wheeler etc. Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 210.

HEMMY v. HAWKINS.

[102 WISCONSIN, 56.]

EXECUTORS AND ADMINISTRATORS—PLEDGE OF ESTATE ASSETS.—A pledge by an executor of the assets of the estate, made to secure a loan for his own personal benefit, is valid if the pledgee has no knowledge or notice of the intended perversion of the proceeds, but takes the property in good faith, believing the loan to be made for the benefit of the estate.

Action by an administrator de bonis non to recover the value of a note secured by mortgage. One Rambusch was executor of the estate of Lucinda Cutler. Such executor wrote to the defendant Hawkins, from whom he purposed to borrow money, that the county judge would make an order in regard to a loan, and then he would be ready to take it. Upon receiving a favorable reply from Hawkins, he sent the latter a note signed by him as executor, also a note and mortgage belonging to the es-

tate, assigned by him as executor as collateral. In a letter accompanying such instruments, he requested Hawkins to place the larger part of the money in the bank to his, the executor's, credit, and retain the balance for some time, "as that is mainly to pay expenses of administration, part of it coming to me." Judgment for plaintiff and defendant appealed.

H. Pease, for the appellant.

Sawyer & Sawyer and Malone & Bachhuber, for the respondent.

60 WINSLOW, J. We have been unable to find any evidence in the record to support the finding of the court to the effect that the defendant, Hawkins, knew that Rambusch borrowed the two thousand five hundred dollars for his own personal use and not for the purposes of the estate. On the contrary, it appears very clearly that Rambusch represented to Hawkins, in effect, that the money was borrowed for the purposes of the estate, and also that Rambusch was a man respected and trusted in the community, and that there were no facts appearing which would have put a reasonable man upon inquiry, or raise a suspicion that Rambusch expected to make any improper use of the money borrowed. Under these circumstances, the law is quite well settled to the effect that the pledge was valid. The principle is well expressed in the case of *Smith v. Ayer*, 101 U. S. 320-326, thus: "There is no doubt that, unless restricted by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will; and even where the sale or pledge is made for other purposes of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained, for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds": See, also, *Schouler on Executors*, secs. 349, 350; *Gottberg v. United States Nat. Bank*, 131 N. Y. 595. The powers of an executor with regard to the sale or pledge of assets are much broader than those of a trustee, because the executor takes title to the personal property and is presumed to have the ⁶¹ right to transfer: *Schouler on Executors*, sec. 350. It does not necessarily follow from the fact that

the pledge was valid that the estate is liable for the loan, nor is that point decided in this case.

It is claimed that four hundred and seventy-two dollars and fifty cents of the two thousand five hundred dollar debt from Rambusch to Hawkins was not advanced by Hawkins, but consisted of a past due debt owing by Rambusch to Hawkins, for interest money collected, and hence that, so far as this sum is concerned, Rambusch pledged the assets of the estate to pay his own debt, which he could not legally do: *Weir v. Mosher*, 19 Wis. 311. There is, however, no evidence showing affirmatively that this four hundred and seventy-two dollars and fifty cents was in Rambusch's hands when he negotiated the loan of Hawkins; but the evidence rather tends to show that the interest moneys were collected after the loan was negotiated, and when Hawkins really owed Rambusch five hundred dollars upon the loan, and that the interest moneys were simply set off against the money which Hawkins would otherwise have forwarded to Rambusch to complete the loan.

By the Court. Judgment reversed, and action remanded with directions to render judgment dismissing the complaint.

Bardeen, J., took no part.

EXECUTORS AND ADMINISTRATORS—PLEDGE OF ESTATE ASSETS.—Where a bank, in good faith, loaned money to an executor upon his individual note, secured by a pledge of stocks belonging to the estate, and upon his statement that the loan was for the purposes of the estate, the pledge was held valid: *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 383.

WALSH v. FISHER.

[102 WISCONSIN, 172.]

MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT.—A servant, working under an entire contract, who voluntarily abandons his work without valid excuse before the end of the stipulated time, cannot recover for his services.

MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT—INSTRUCTIONS.—In an action to recover for services under an entire contract, a requested instruction to find against the servant if he quitted the service before the end of his term, pursuant to an agreement with others to strike, should not be qualified or confused by adding a clause as to his reason for quitting and the effect upon him of danger, or apparent danger, from the contemplated strike. The action of the court in adding such qualifying clause is reversible error.

MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT—AMOUNT OF RECOVERY.—If a servant, engaged under an entire contract, quits the service before the end of his term, by reason of threats of strikers to do him bodily harm, he can recover only the value of his services after deducting the damages, if any, suffered by the master by reason of the breach of the contract.

MASTER AND SERVANT—STIPULATED DAMAGES FOR BREACH OF CONTRACT.—A stipulation in a contract of employment that the damages for a breach thereof in quitting the service of contractors for the loading and unloading vessels and cars upon docks shall be the loss of fifteen days' wages is justified by the uncertainty as to the injury that may be caused thereby to the employer's business. Such stipulation is liquidated damages and not a penalty.

Action on an assigned claim for fifteen days' personal services rendered by one McKillop to contractors for the loading and unloading of vessels and cars upon docks. McKillop was employed under an entire contract stipulating that for a breach thereof by quitting the service the employer might retain as liquidated damages any wages then earned by the employé quitting, not exceeding fifteen days' wages in all. McKillop quit the service of such contractors before the end of his term. Judgment for plaintiff, and defendants appealed.

A. T. Rock, for the appellants.

O'Brien & Vaughn, for the respondent.

¹⁷⁷ WINSLOW, J. The question which was sharply litigated in this case was whether McKillop quit because of genuine and justifiable fear of serious bodily violence at the hands of the hourly men who had struck, or because of the agreement or resolution of the day men to strike at noon of the 9th of July, unless the demands of the hourly men were acceded to. There was evidence which would justify a finding either way on these propositions. Certainly there were ample facts which would justify the conclusion that McKillop quit because he chose to abide by the resolution, or, in other words, that he was in fact one of the second set of strikers. If such ¹⁷⁸ were the case, no recovery could be had, because his contract was entire and he voluntarily abandoned his work, without valid excuse, before the end of the stipulated time: *Koplitz v. Powell*, 56 Wis. 671.

This proposition of law was substantially correctly stated in the following instruction, which was offered by the defendant: "You are instructed that if Mr. McKillop left his work, under and pursuant to the agreement of the day men and the hourly

men on the night of July 8, 1896—that is, to quit at noon, July 9th, if defendants did not accede to the proposition submitted to them on July 8th—then plaintiff cannot recover, and your verdict shall be for the defendants.”

The court read this instruction to the jury, and added the following words: “That is, if that was the reason he quit, and the danger was not such—that the danger or apparent danger was not such—that the man of ordinary nerve would have refused or declined to go on with the work, your verdict will be for the defendants.”

We think that the addition of this limitation to the instruction was error. Irrespective of the statute which requires an instruction to be given as asked or refused in full (Rev. Stats. 1878, sec. 2853), we think the plaintiffs in error were certainly entitled to have the instruction which they asked given without dilution or qualification. The proposition was that, if Mr. McKillop quit in pursuance of the agreement to strike, he could not recover, and the jury should have been so informed plainly and directly, without being required to determine, in addition, what would have been the condition of mind of a hypothetical man who, perhaps, had entered into no agreement to strike. The last clause added a confusing element to a simple proposition, and it was error to attach it to the instruction as asked.

A more important and vital question, however, is yet to be considered. There was a motion to direct a verdict for ¹⁷⁹ the plaintiffs in error, which was overruled and exception taken; and this raises the question whether, in any view of the case, the defendant in error is entitled to recover. It seems to have been assumed upon the trial below, and upon the argument in this court, that, if McKillop was excused in leaving the defendant's service on account of the threats of strikers to do him bodily harm, he can recover for the time of his actual service, without deduction for damages suffered by the master by reason of his breach of contract. Such is certainly not the law. If a servant is prevented from performing his contract by the act or fault of the master, the master cannot, of course, recover or recoup any damages, because the breach is his own: Wood on Master and Servant, 2d ed., sec. 148. But, in case the servant is prevented from fulfilling his contract for personal services by his own sickness, this is not the fault or act of the master, and while the servant will generally be excused from fulfilling his contract and be entitled to recover for the labor performed up to the time of his sickness, the master will be entitled to coun-

terclaim his damages for the breach of contract, for which he (the master) was not responsible. The justice of the rule is apparent on a moment's reflection: Wood on Master and Servant, 2d ed., sec. 122.

Now, it may well be that McKillop would be justified in quitting if the danger of bodily injury was real and imminent, and the threats of the strikers were so serious that a reasonable man in McKillop's situation would have been justified in believing that he was in imminent danger if he continued to work; for it can hardly be claimed that a man must daily carry his life in his hand in such a manner. Still, this condition of things was a condition for which the master was in no way responsible. If it operated to relieve McKillop from his obligation to work the entire season, still it manifestly could not operate to give him any greater right against his employer than as though he had been relieved of ¹⁸⁰ his contract by sickness or vis major, for which his employer was not responsible. It is still the employé, and not the employer, who breaks the contract; and the rule that the party who breaks an entire contract shall have no recovery by reason of his part performance of it is relaxed only to the extent of permitting recovery of compensation for the actual benefit conferred upon the employer, or, as more usually expressed, by allowing the employé the value of his services after deducting the damages, if any, suffered by the employer by reason of the breach of the entire contract: Wood on Master and Servant, sec. 122; Fenton v. Clark, 11 Vt. 557; Hubbard v. Belden, 27 Vt. 645; Patrick v. Putnam, 27 Vt. 759; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Wolfe v. Howes, 20 N. Y. 197-203, 75 Am. Dec. 188; Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189; Allen v. McKibbin, 5 Mich. 449-455.

In the last-cited case (Allen v. McKibbin, 5 Mich. 449), the court tersely states the rule as to the measure of recovery thus: "Without reviewing the cases in detail, we think that the only rule which harmonizes them may be laid down substantially as follows: The defaulting plaintiff can in no case recover more than the contract price, and cannot recover that if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract. The party in default can never gain by his default, and the other party can never be permitted to lose by it; and the price thus determined is the true amount recoverable on a quantum meruit."

The recovery, then, in the most favorable aspect of the case, is limited to the amount of McKillop's wages at the agreed rate, less any damages resulting to the employer from the termination of the contract. Those damages are stipulated and fixed. The language used in the written agreement is apt and clearly expresses the understanding that the damages recoverable for a termination thereof shall be fifteen days' wages. The consequences of a termination ¹⁸¹ of this contract of employment were eminently of the character to justify stipulation of the damages in advance. Uncertainty as to the possibility and expense of finding another employé, and as to the wages to be paid if one be found; uncertainty as to the extent of interruption or embarrassment of the numerous other employés, joined with the uncertain, but possibly very large, liability to vessel owners or shippers which might be imposed upon defendants by interruption of their work, the apportionment of which damages to each, should several of the contracting employés quit at once, would be extremely difficult and intricate—all these elements bring the situation within the rule adopted in *Berrinkott v. Trap-*hagen, 39 Wis. 219, 226.

The damages stipulated by the contract equal the amount of the defendant in error's demand, and therefore, upon the most favorable view of the evidence, preclude any recovery. A verdict for the plaintiffs in error should have been directed, and the verdict for the defendant in error should have been set aside.

By the Court. Judgment reversed, and action remanded for a new trial.

Bardeen, J., took no part.

MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT. One who agrees to serve another for a specified time for a salary to be paid upon the expiration of such term of service, and who voluntarily, against his employer's consent and without cause, leaves the employment before the end of the term, can recover nothing for the service he may have rendered: Monographic note to *Hayward v. Leonard*, 19 Am. Dec. 275, 280. The general rule is, that there can be no recovery on an entire contract for personal services until they have been fully performed: Monographic note to *Huyett etc. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 290. The rule is otherwise in New Hampshire: Note to *Hayward v. Leonard*, 19 Am. Dec. 272.

MASTER AND SERVANT—BREACH OF CONTRACT—AMOUNT OF RECOVERY.—If one performs services for another on a special contract, and, for any reason except a voluntary abandonment, fails to fully comply with his contract, and the service and materials are of value to him for whom they were rendered and furnished, he may recover the reasonable value of such material and services, after deducting therefrom any damages the

party for whom such materials were furnished and services were rendered has sustained by reason of such failure: *Monographic note to Huyett etc. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 291; *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161.

MASTER AND SERVANT—LIQUIDATED DAMAGES FOR BREACH OF CONTRACT.—A sudden breaking off of a contract for services by either party involves such difficulties concerning the actual loss as renders a reasonable agreement for stipulated damages appropriate and valid: *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865. See, also, *Willson v. Mayor*, 83 Md. 203, 55 Am. St. Rep. 339.

WEBSTER v. DOUGLAS COUNTY.

[102 WISCONSIN, 181.]

OFFICERS—ACTION BY TAXPAYERS AGAINST TO RESTRAIN ILLEGAL PAYMENTS.—A taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes, and may also, under proper circumstances, compel public officers, and even third persons, to repay into the public treasury money already paid out illegally.

MUNICIPAL CORPORATIONS—LIMITATION ON AMOUNT OF HIGHWAY EXPENDITURES.—A statute providing that county boards of supervisors "may annually levy, on the taxable property of the county, a county road tax, not exceeding eight thousand dollars, which shall be expended under their direction, in making culverts, grading, graveling, ditching, or otherwise improving such highways," fixes and limits the amount which may be expended in any one year to the amount previously raised by the tax.

OFFICERS—ACTION BY TAXPAYERS AGAINST TO RESTRAIN ILLEGAL PAYMENTS—LACHES.—A taxpayer's suit to enjoin an illegal expenditure of money upon highways, not commenced until after part of the work has been done and paid for, does not show such laches as bars the action as to future illegal work and payments.

INJUNCTION—MODIFICATION.—An order modifying an injunction restraining a board of supervisors from expending money or doing work on highways under an illegal resolution, so as to allow necessary repairs to be made upon county roads designated by such resolution for the expenditure of money, merely permits the making such repair on such roads as is necessary to make travel safe, and does not permit general road work to be carried on as contemplated by such unlawful resolution.

INJUNCTIONS—BREACH OF—JUSTIFICATION.—The deliberate disobedience of an injunction by county officers in proceeding with road work and paying therefor, cannot be justified on the ground of good faith, nor can there be any estoppel of their act by the board of supervisors, nor any estoppel which nullifies the command of the court.

OFFICERS—LIABILITY FOR BREACH OF INJUNCTION. County officers who assist in the violation of an injunction, either by voting the issuance of orders or countersigning them, or by

paying out money thereon, as well as the recipients of such money, to the extent of the amounts respectively received by them, may be compelled, in an action by a taxpayer, to repay to the county treasury the sums thus wrongfully paid out.

OFFICERS—LIABILITY OF FOR MONEY WRONGFULLY PAID OUT.—Money paid out by public officers in direct violation of law may be recovered from the officials themselves, and from the recipients thereof in actions seasonably brought by taxpayers on behalf of the public, especially when the transaction is marked by haste, fraud, collusion, or concealment.

MUNICIPAL CORPORATIONS—INNOCENT PURCHASERS OF WARRANTS.—A person who, for a valuable consideration and in good faith, purchases county warrants issued in payment of work done under an unlawful resolution of a board of supervisors, cannot, in a taxpayer's action, be required to make repayment of money received on such warrants, when such action is not commenced until a large part of the work has been completed and such warrants issued and paid.

INTEREST UPON MONEY UNLAWFULLY DRAWN OUT OF A COUNTY TREASURY may be allowed from the time it was thus drawn out, in an action by taxpayers to recover it from public officials and contractors.

COSTS—OFFICERS' LIABILITY.—Upon the recovery of judgment against public officers in a taxpayers' suit, restraining such officers from paying out public money and compelling the repayment of moneys already paid out, the defendants are liable for the costs of suit.

F. H. Remington and Titus & McIntosh, for the appellant.

C. R. Fridley, Loud & O'Brien, and McCausland & Smith, for the respondent.

¹⁸⁹ WINSLOW, J. It is well settled in this state that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes, and may also, under the proper circumstances, compel public officers, and even third persons, to repay into the public treasury money already paid out illegally. These propositions do not require further discussion: Willard v. Comstock, 58 Wis. 565, 46 Am. Rep. 657; Frederick v. Douglas County, 96 Wis. 411; Quaw v. Paff, 98 Wis. 586; Land etc. Co. v. McIntyre, 100 Wis. 245, 258, 69 Am. St. Rep. 915.

The crucial question in this case is whether the county could legally spend more than eight thousand dollars in one fiscal year upon highways, under the provisions of section 1308 of the Revised Statutes of 1878. This section, after providing that county boards may adopt highways or parts of highways as county roads, or may designate highways or parts of highways for the purpose of ¹⁹⁰ spending money in their repair without

adopting them as county roads, then provides that any county board "may annually levy, on the taxable property of the county, a county road tax not exceeding eight thousand dollars, which shall be expended, under their direction, in making culverts, grading, graveling, ditching, or otherwise improving such highways."

It seems very manifest to us from a careful reading of the section that the amount of the tax fixes the amount which may be expended in any one year. The amount is plainly limited to the amount previously raised by the tax. The board may first raise a sum, and then spend it. Whatever is said to the contrary in *Harrison v. Milwaukee Co.*, 51 Wis. 645, was not necessary to the decision of that case, and must be considered as overruled: See *Kane v. School Dist.*, 52 Wis. 502.

In the present case, the board raised eight thousand dollars by tax levied in November, 1893, and spent the entire sum before the 5th of June, 1894. They then proposed to spend eight thousand dollars more, and pay for the work temporarily out of the normal school fund, and finally out of the levy to be made in November, 1894. This they had no power nor right to do. They however proceeded, not in the manner required by section 1309, but in a lawless and irregular manner, to parcel out two thousand dollars to each of the chairmen of the four county towns, and to allow each chairman to spend his portion as he chose. To say that this entire proceeding was irregular and illegal is to speak of it very mildly. The plaintiffs brought their action after the work had begun, and just after about two thousand three hundred dollars of orders had been issued and paid. Laying aside, for the moment, all questions as to the status of the sums which had thus been paid out before the action was begun, we can see no reason why the plaintiffs did not present a case which would require all further work and payments to be stopped. Certainly, it cannot be said that there was laches so far as ¹⁹¹ future work was concerned, and, as we have already indicated, the expenditure was clearly illegal.

The temporary injunctive order, in no uncertain terms, prevented the board from carrying out the work which had been illegally commenced under the resolution of June 5th. It forbade absolutely the allowance of any bills, or the payment of any orders, for any such work done thereafter and prior to the next tax levy. The only substantial change in this prohibition, which was made by the modifying order of September 3d, so far as the present question is concerned, was to allow neces-

sary repairs to be made upon county roads or roads which had been designated for the expenditure of county money. The purpose and meaning of this modification was to allow the board to make emergency repairs, or such repairs on roads as were necessary to make travel safe, so that the duty of the county to travelers upon its highways might still be discharged. It is idle to say or to argue that the meaning of the modification was to allow general road work, as contemplated by the resolution of June 5th, to be carried on under new contracts. If such was its meaning, then it was not a modification, but an abrogation, of the injunctive order, and the proper course would have been to vacate the original order. New contractors were found who were willing to go on with the work and take their chances. A majority of the county board, after the tax levy of November, 1894, pretended to accept the work, and a considerable part of it was paid for. It is said, and gravely found by the circuit court, that this was all done in good faith! There is as little room for good faith in the deliberate disobedience of an injunctive order as there is in the deliberate commission of a crime. Nor is there room for ratification or estoppel. The plain fact is that the acts of the public officials and contractors, after the injunctive order of August 7th was issued and served upon them, in proceeding with general road work, and in ¹⁸⁹⁵ issuing orders to pay for the work, and in actually paying for a good part of it, were and are utterly indefensible. They were deliberate contempts of court. They could not be in good faith, under such circumstances, nor can acts of ratification or estoppel nullify the command of the court. By the temporary injunction the parties to the action were commanded to refrain from further action until the controversy was heard upon its merits and decided, so that the final judgment might be effective. This order has been disobeyed, and large sums have been paid out by the county officers in defiance of the order. Now, at the close of the litigation, it is found that the preliminary injunction should be made permanent, but the status quo has been changed by disobedience of the preliminary order, and this disobedience is alleged to have been a disobedience in good faith, and a disobedience which the county board has ratified and condoned. These claims are manifestly absurd.

The work, under the resolution of June 5, 1894, was illegal from start to finish. After the injunctive order of August 7th, it should have stopped at once in obedience to the order of the court; but the order having been disobeyed and a large part

of the money having been paid out, the officials who assisted in the violation of the injunction, either by voting the issuance of orders or by countersigning the same, or by paying out the money thereon, as well as the defendants who received such moneys, to the extent of the amounts respectively received by them, must be required by the judgment to repay to the county treasury the sums so wrongfully paid out.

The question of the recovery of the sums paid out on the 6th of August, just prior to the commencement of this action, is now to be considered. The total amount then paid out was two thousand three hundred and forty-two dollars and ninety-five cents, of which one thousand and eight dollars was paid to the defendant McClure, chairman of the town of Nebagamain, and also chairman of the county board, upon four orders issued ¹⁸⁹⁸ to the contractor Cassidy, and indorsed by him to McClure for the convenience of Cassidy; one thousand and seven dollars and twenty-five cents was paid to the defendant the Duluth Trust Company upon four orders issued to the contractor McLaggan, and purchased by the company of McLaggan; and three hundred and twenty-seven dollars and seventy cents was paid to the defendant O. K. Anderson, then county clerk of Douglas county, upon an order issued to the contractor Cloney and by him transferred to Anderson. As to the moneys paid to McClure and Anderson, as assignees of the Cassidy and Cloney orders, the situation is not doubtful. Both of these defendants were public officials, charged with important duties in relation to the expenditure of the public moneys. They were trustees of the public funds. Among other duties, both of these officers were required to countersign all county orders: Rev. Stats. 1878, secs. 667, 709, subd. 3. It was their sworn duty to issue no orders for highway work, under section 1309, until a committee of three had reviewed the work and reported that the same was done in accordance with the contract. This duty they violated flagrantly. Not only was there no such inspection of the work, but the bills were railroaded through the board on the day of their presentation or on the following day, when there were no moneys in the fund to pay them, evidently with a settled design to give no opportunity for inspection. The warrants were immediately indorsed by the contractors to the defendants McClure and Anderson, respectively, and the money drawn out of the treasury. It is true the court has found that the defendants in question had no pecuniary interest in the transaction, and that they acted in good faith, but even these findings

cannot relieve them from liability for their breach of trust in drawing out of the treasury money for a purpose not authorized by law. Such money they must return, even if they had no wicked intent; but we do not think the circumstances in proof admit of a finding of good faith. The allowance of these accounts and payment of these moneys ¹⁰⁴ were marked by haste and apparent collusion with the contractors, which requires an explanation more convincing than any which appears in the evidence in this case. The presumption of fraud which necessarily arises from the allowance of illegal bills so hastily, when there were no funds in the treasury to pay them with, the money being drawn out by the auditing officers themselves, has not been met and rebutted. Under the authorities cited in this opinion in our own state, as well as the authorities cited in *Frederick v. Douglas County*, 96 Wis. 411, we hold that the defendants McClure and Anderson must be held liable to return the county funds so received by them. The general principles of law laid down in the cases of *Frederick v. Douglas County*, 96 Wis. 411, and *Land etc. Co. v. McIntyre*, 100 Wis. 245, 258, 69 Am. St. Rep. 915, are applicable to this case. Moneys paid out by public officers in direct violation of law may be recovered from the officials themselves, and from the recipients thereof, in actions which are seasonably brought by taxpayers on behalf of the public, especially where the transaction is marked by haste, fraud, collusion, or concealment. The evidence of haste, collusion, and concealment in this case are too plain to be overlooked or misunderstood, and it is evident that the contractors McLaggan, Cassidy, Cloney, and Agen actively assisted the disbursing officers in their efforts to deplete the treasury before interference by action was possible, and hence they must also be held liable to the extent of the moneys received by them, respectively.

As to the moneys paid to the Duluth Trust Company, the court found that the orders held by the company were purchased for a valuable consideration, and in good faith, and with no knowledge of any conspiracy or irregularity in the expenditure of the money. These findings are sufficiently supported by the evidence, and we think they must be held to free the defendant trust company from liability in this form of action, at least. It is true that the orders possess none of the qualities of negotiable paper, and that the holder ¹⁰⁵ stands in the shoes of the payee: 1 Dillon on Municipal Corporations, sec. 503. Had payment been refused by the county treasurer, and action

been brought against the county upon them, all the defenses which could have been urged against the original holder could have been urged against the transferee. But the question here is quite different. The resolution under which the work in question was done was adopted June 5, 1894, and work was at once commenced under it, so that nearly three thousand dollars' worth of highway work had been done on the 3d of August before this suit was commenced. The resolution was public in its nature, the work was also public, and we feel that the neglect in bringing the action until after so much work had been done, and orders issued and negotiated in the hands of innocent third persons, must operate to prevent recovery against such third persons, upon the principle of laches, as laid down in the case of *Frederick v. Douglas County*, 96 Wis. 411. The plaintiffs have invoked the relief of a court of equity, and they have delayed in so doing until serious injury will result to a party who had no participation in the illegal contract, if the plaintiffs be allowed to recover. We are not now discussing the rights or remedies of the county itself, in a proper action brought by its officers to recover funds illegally obtained from the treasury, but simply what a court of equity will do when its aid is invoked by a taxpayer who might have brought his suit earlier and prevented the mischief, had he chosen to do so.

The defendant trust company cannot be held liable in this action. The supervisors who authorized the illegal contracts and expenditures must, however, be held liable, and the auditing and disbursing officers, as well as the contractors and their assignees, to the extent of the amounts received by them, respectively, after the commencement of this action.

By the Court. As to the defendant, Duluth Trust Company, the judgment is affirmed, without costs, except attorney's ¹⁹⁰ fees; and, as to the remaining defendants, the judgment is reversed, with costs, and with directions to enter judgment for the plaintiff in accordance with this opinion.

The following opinion was filed February 21, 1899:

WINSLOW, J. A motion is made to correct the mandate in this case so that it shall direct the allowance of interest upon the sums drawn out of the county treasury. It is apparent that interest ought to be allowed from the time the moneys were unlawfully drawn out, and the opinion and mandate will be amended so as to direct that such interest be allowed. The mo-

tion also asks that the trial court be directed to allow costs against the defendants upon final judgment. Certainly, there can be no question but that the defendants should be adjudged to pay the costs of the action, and the circuit court should be directed to enter such judgment.

By the Court. It is so ordered.

Bardeen, J., took no part.

OFFICERS—ACTION BY TAXPAYER AGAINST TO RESTRAIN UNLAWFUL PAYMENTS.—A resident taxpayer may maintain suit to restrain the municipal authorities of a city from illegally disposing of the moneys of the municipality, or the illegal creation of a debt which he, in common with other property owners, may otherwise be compelled to pay by taxation: *Tukey v. Omaha*, 54 Neb. 370, 69 Am. St. Rep. 711; *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224. A court of equity, at the instance of a taxpayer, may restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from making payments of illegal claims: *Stevens v. St. Mary's School*, 144 Ill. 336, 36 Am. St. Rep. 438; *McCord v. Pike*, 121 Ill. 288, 2 Am. St. Rep. 85, and monographic note thereto.

HIGHWAYS—POWER OF OFFICERS.—In altering and laying out highways, every substantial requirement of the statute must be complied with by the supervisors or road officers. Otherwise their proceedings are void: *Wayne v. Caldwell*, 1 S. Dak. 483, 36 Am. St. Rep. 750.

OFFICERS—LIABILITY FOR BREACH OF INJUNCTION.—An injunction addressed to the mayor, aldermen, and commonalty of a city, duly served on the proper officers of the corporation, is obligatory upon all officers and agents of the city having knowledge of it, in such sense that any of them taking part in a violation may be individually punished for contempt, though he was not individually a party to the injunction suit: *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

INJUNCTION—BREACH OF.—Defendants served with injunction are personally responsible for a violation of the order of the court, no matter with what view they acted: *Quackenbush v. Van Riper*, 3 N. J. Eq. 350, 29 Am. Dec. 716.

OFFICERS—LIABILITY FOR MONEY PAID OUT.—Public officers, such as supervisors of a county, are personally liable to it for moneys which they have fraudulently misapplied, misappropriated, or lost: *Land etc. Co. v. McIntyre*, 100 Wis. 258, 69 Am. St. Rep. 925; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 Am. St. Rep. 612.

PURCHASERS OF WARRANTS—RIGHTS OF.—The fact that an injunction has been issued to a municipal corporation and its treasurer forbidding the payment of city warrants does not justify the refusal of that officer to pay such warrants on the demand of the owner thereof, when neither he nor any of his predecessors in interest were parties to the suit in which such injunction issued: *Savage v. Sternberg*, 19 Wash. 679, 67 Am. St. Rep. 751.

RELYEA v. TOMAHAWK PAPER AND PULP COMPANY.

[102 WISCONSIN, 301.]

CONSTITUTIONAL LAW—STATUTORY RIGHTS—GRANT UPON CONDITION OR CHANGE IN CONDITIONS.—Statutory rights to recover for personal injury may be conferred upon such conditions as, in the wisdom of the legislature, may seem best, and such conditions may be changed from time to time, or such rights may be taken away entirely at the legislative will. They are not subject to the protection of constitutional provisions.

CONSTITUTIONAL LAW—STATUTORY RIGHTS—CONDITIONS PRECEDENT.—A statute requiring notice to be served as a condition of recovery for injury to an employé through actionable negligence of his employer, is a condition acting on the remedy alone, the right not being dependent upon the statute.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—It is within legislative power to change a statute of limitations regarding the remedy for the enforcement of existing rights, if a reasonable time is allowed to resort to existing remedies or a reasonable remedy is provided to enforce such rights. A statute which undertakes to extinguish rights of action without giving such opportunity is not deemed a statute of limitations, but an arbitrary, unlawful impairment of a constitutional right.

LIMITATION OF ACTIONS.—The statute of limitations in force when an action is commenced governs, in the absence of some indication therein, or in some other provision of law, to the contrary.

CONSTITUTIONAL LAW.—PURELY STATUTORY RIGHTS may be, by the power conferring them, made to depend upon a new condition, or may be taken away entirely.

LIMITATIONS OF ACTIONS.—A statute of limitations, strictly so called, operates on the remedy directly.

CONSTITUTIONAL LAW.—STATUTES CHANGING THE CONDITION of a right of action for damages given by statute is a condition precedent to the right to such damages, hence acts directly on the right, and is not a statute of limitations in the ordinary sense of that term.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—A law changing the time for, or conditions of, the enforcement of common-law rights are in the nature of statutes of limitation, which if of such a character as to materially affect the right itself, are within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—A change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement which does not allow a reasonable time within which to commence an action for such enforcement or to comply with the new condition, is unconstitutional and void as to existing rights otherwise valid.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—If a time is specified in a statute of limitations for the commencement of an action to enforce existing rights, or to comply with the new conditions specified therein, such time is conclusive, in the absence of a clear abuse of legislative discretion and disregard of constitutional rights.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—If a new act of limitations does not provide for existing causes of action, yet uses general language applicable to all actions, there being nothing in the act and no other law making any exception to its application, it applies to all causes of action, subject to the judgment of the court, as to such cause, whether the person affected had a reasonable time after its enactment to comply therewith.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—A new statutory condition for the enforcement of a common-law right of property, such as the recovery of damages for bodily injury attributable to actionable negligence, having the effect of changing a limitation of five years to sixty-one days, and making no exception in favor of minors, does not leave a reasonable time for compliance with such condition and is unconstitutional and void.

Action to recover for personal injury received by plaintiff, a minor, while in the employ of defendant, and alleged to have been caused by the actionable negligence of the latter. Plaintiff did not commence his action, nor serve the notice required by statute, until about one year after the injury was received. Judgment for the defendant, and plaintiff appealed.

J. C. Kerwin, for the appellant.

A. H. Woodworth and Curtis, Reid & Smith, for the respondent.

³⁰³ **MARSHALL, J.** The sole question presented here is, Was plaintiff's cause of action extinguished by the failure to serve a notice under chapter 304 of the Laws of 1897? The learned trial court decided that in the affirmative, basing his conclusion, probably on *Plum v. Fond du Lac*, 51 Wis. 393; *Reed v. Madison*, 83 Wis. 171. They were cases involving the applicability of acts of the legislature adding new conditions precedent to the statutory right to compensation for personal injuries received on public highways on account of the insufficiency thereof. In the *Plum* case the time left after the passage of the act for the performance of the new condition was eighty days, and in the *Reed* case forty days. The acts were rightly held applicable because the rights affected were purely statutory. While the rule is inflexible that rights not dependent on statute are guaranteed by the national constitution against impairment, either by laws ³⁰⁴ affecting existing contracts or taking property without due process of law, mere statutory rights may be conferred upon such conditions as in the wisdom of the legislature may seem best, and the conditions may be changed from time to time, even as to existing rights, or such rights may be

taken away entirely, at the legislative will. Such rights do not come within the constitutional provision. If the conditions requisite to their existence be once satisfied, a new one may be added as in the two cases cited, and whether the time given in which to comply with it be long or short is a matter exclusively of legislative discretion. True, there is language in opinions, treating of a new condition respecting existing statutory rights, indicating an idea in the judicial mind that a law imposing such conditions takes effect as to such rights if a reasonable length of time be left for the claimant to comply with it; but the real ground upon which the decisions rest is that, the rights being statutory, they are entirely the subject of legislative discretion.

The difference between a statute requiring notice to be served, as for example section 1339 of the Revised Statutes of 1878, as a condition of a right to damages for an injury through failure of duty on the part of a municipality to keep its highways in a proper state of repair, and a statute requiring such a notice to be served as a condition of recovery for injuries to an employé through actionable negligence of his employer, is that the former is a condition of the right to damages and the remedy to recover the same as well, while the latter is a condition acting on the remedy alone, the right not being dependent on the statute at all. Such difference is well defined in the books and universally recognized. In *Smith v. Cleveland*, 17 Wis. 556, it is said, in effect, that the difference between laws that the legislature may change at will and those which the constitution protects from interference to the prejudice of vested rights is, that under the former the right is dependent on the law, and under the latter the right itself is ³⁰⁵ independent of the law. The subject was recently discussed in *Schaefer v. Fond du Lac*, 99 Wis. 333, and *Daniels v. Racine*, 98 Wis. 649, where it is said that a right given by statute may be changed by adding new conditions, or wholly taken away by statute. There, as in most cases of the kind, the right of action was spoken of as synonymous with the right itself, and properly so. If the distinction be not kept in mind between statutory and common-law rights, where the court speaks regarding a condition of the former as precedent to a right of action therefor, it will be taken as meaning that the condition is in the nature of a limitation acting on the remedy alone.

From what has been said, it is clear that the rule in *Plum v. Fond du Lac*, 51 Wis. 393, and similar cases where the right

acted upon by a legislative change of condition upon which the right depended was a creature of statute, does not apply to this case. Plaintiff had a right to compensation for his injuries independent of the statute. He was entitled to six years from the happening of the injury before making any move to enforce such right. In that situation chapter 304 of the Laws of 1897 was passed, which, it is claimed, extinguished the right in sixty-one days after its passage and more than five years before it would have been extinguished by the statute of limitations as it before existed. While time for the commencement of the action was not in terms changed, the condition precedent to such commencement had that effect, rendering the law essentially a statute of limitations, and it must be so treated.

It is well settled that it is within legislative power to change a statute of limitations regarding the remedy for the enforcement of existing rights, if a reasonable time be allowed to resort to existing remedies, or a reasonable remedy be provided, to enforce such rights. A statute which undertakes to extinguish rights of action without giving such opportunity is not deemed a statute of limitations, but an ³⁰⁸ arbitrary, unlawful impairment of a constitutional right. It is further well settled that what is a reasonable time is a matter largely of legislative discretion. If such discretion be once exercised by a saving clause in the act providing for existing causes of action, that is controlling unless, manifestly, the time be unreasonable. That must appear beyond a reasonable doubt, however, in order to justify the court in condemning the law as unconstitutional. Where there is no saving clause in the act, and it thereby appears that the legislature did not consider the subject at all, the court must apply it, or not, to causes of action existing when it took effect according as it shall judicially appear that a reasonable time was left thereafter for the plaintiff to commence his action or perform the new condition. Subject to this rule, the statute of limitations in force when an action is commenced governs, in the absence of some indication therein, or in some other provision of law, to the contrary: *Woodbury v. Shackelford*, 19 Wis. 55; *Converse v. Burrows*, 2 Minn. 239; *Toland v. Wells*, 59 Ind. 529.

The legal principles thus far mentioned in this opinion are deemed to be too elementary to warrant any extended discussion or citation of authorities in support of them. They may be stated concisely thus: A purely statutory right may be, by the power conferring it, made to depend upon a new condition,

or taken away entirely. A statute of limitations, strictly so called, operates on the remedy directly. A statute changing the condition of a right of action for damages given by statute is a condition precedent to the right to such damages, hence acts directly on the right, and is not a statute of limitations in the ordinary legal sense of the term. Such rights are not protected against impairment by constitutional guaranties, while rights which exist independent of the statute are so protected. A law changing the time for, or conditions of, the enforcement of a common-law right, is in the nature of a statute of limitations which, if of such a ³⁰⁷ character as to materially affect the right itself, is within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law. A change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement, which does not allow a reasonable time within which to commence an action for such enforcement or comply with the new condition, is within the inhibition mentioned and is void as to such existing rights, otherwise valid. If a time be specified in a statute of limitations for the commencement of an action to enforce existing rights, or to comply with the new conditions specified therein, showing that the legislature exercised its judgment in the matter, it is not within the jurisdiction of courts to examine the question of the proper exercise of such power, in the absence of a clear abuse of legislative discretion and disregard of constitutional rights. When the new act of limitations does not provide for existing causes of action, yet uses general language applicable to all actions, there being nothing in the act, and no other law, making any exception to its application, it applies to all causes of action, subject to the judgment of the court, as to each such cause, whether the person affected had a reasonable time after its enactment to comply therewith.

It follows that chapter 304 of the Laws of 1897 does not apply to plaintiff's claim for damages, unless we can say that the sixty-one days allowed for him to comply with it is reasonable. In determining that we are not embarrassed by any determination of the subject by the legislature, for the law made no provision for existing causes of action. That was entirely overlooked, as it appears. How much time is reasonable for a person circumstanced as plaintiff was to comply with the statutory condition under consideration must be determined having regard to his being under age and the fact that, while before he

had the unconditional ³⁰⁸ right to begin his action at any time within about five years, after, save on performance of the new condition, his right was extinguished in sixty-one days. What is a reasonable time for the enforcement of existing rights regardless of new conditions of limitation must necessarily vary according to the character of such rights and the class of persons affected, and many other circumstances. Very little light is furnished by a decision as to what is reasonable under some circumstances, to enable one to determine what is reasonable under other circumstances. We are safe in saying, however, that no precedent can be found for holding that a new condition for the enforcement of a common-law right of property, having the effect of changing a limitation of five years to sixty-one days, and making no exception in favor of minors, leaves a reasonable length of time for compliance with such condition. It appears to be so clearly insufficient that discussion and authority in support of that view are unnecessary. The passage of the act without some adequate saving clause as to existing rights was evidently an oversight, as at the first opportunity after its passage the legislature remedied the infirmity by so changing the law as to exempt causes of action existing before such passage. The result is, we hold that chapter 304 of the Laws of 1897 does not apply to this case, and that the demurrer was improperly sustained.

By the Court. The order appealed from is reversed, and the cause remanded for further proceedings according to law.

Bardeen, J., took no part.

CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.—The legislature has power to pass limitation laws and to alter or change them by extending the time for their enforcement, or to shorten the time by giving a reasonable time for asserting the right, provided such laws do not affect cases to which the bar of the existing statute of limitations has attached: Note to *Walker v. Burgess*, 67 Am. St. Rep. 776. The time within which to bring an action may be lessened by statute, as to existing causes of action, provided the suitor has still a reasonable time, after the law is passed, in which to commence his suit. If the statute fails to fix such time the court is to decide: *Merchants' Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 66 Am. St. Rep. 653. As to what is a reasonable time, see *Culbreth v. Downing*, 121 N. C. 205, 61 Am. St. Rep. 661. As applied to pending actions which are barred by the statute, a repeal of the statute of limitations is unconstitutional and void: *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384. The legislature has power to fix a reasonable time within which an existing judgment may be enforced, as well as to pass any other act of limitations, without violating the provisions of the United States constitution guarding the obligation of contracts: *Griffin v. McKenzie*, 7 Ga. 163, 50 Am. Dec. 889, and extended note

thereto. See, also, *Briscoe v. Anketell*, 28 Miss. 361, 61 Am. Dec. 553.

CONSTITUTIONAL LAW—STATUTES AFFECTING REMEDY. A retroactive statute is valid only when it is remedial, and does not impair contracts or devert vested rights. Whenever a statute so far alters a remedy as to impair, destroy, change, or render the right scarcely worth pursuing, it necessarily impairs the obligation of the contract upon which such right is founded and must be denied effect: *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194; *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438.

CONSTITUTIONAL LAW—STATUTES CREATING A RIGHT TO REDEEM may be altered. This right is the creature of the statute, relating to the remedy, and is not so essential to a contract right as to be entirely beyond legislative control: *Anderson v. Anderson*, 129 Ind. 573, 28 Am. St. Rep. 211.

HUGANIR v. COTTER.

[102 WISCONSIN, 323.]

DAMAGES FOR FALSE REPRESENTATIONS.—In an action to recover for false representations, whereby a person is induced to enter into a contract with another to cut and haul timber on the lands of the latter, wherein the plaintiff waives the tort and seeks to recover on an implied contract, he is entitled to recover only the amount which the defendant has been enriched or benefited by his false representations, and he cannot recover as damages his prospective profits resulting if the facts had been as represented

Fleet & Porter, for the appellant.

Van Hecke & Smart, for the respondent.

³²⁴ CASSODAY, C. J. This case was here upon a former appeal from a judgment in favor of the plaintiff, and was reversed for error in the admission of evidence: *Huganir v. Cotter*, 92 Wis. 1. Subsequently, the cause was retried, and at the close of the trial the jury returned a special verdict, to the effect: 1. That the defendant, before the execution and delivery of the written contract, did make statements to the plaintiff as to the quantity of timber on the lands described in the contract; 2. That before the execution of the contract he represented to the plaintiff that there were one million five hundred thousand feet of nine-log timber on the lands; 3. That such representations, so made by the defendant, were made for the purpose of inducing the plaintiff to enter into the contract; 4. That the defendant made such representations as to the size and quantity of the timber with intent to deceive the plaintiff;

5. That the plaintiff relied solely upon the representations so made to him by the defendant as to the size and quantity of the timber; 6. That the defendant knew, or ought reasonably to have known, that the statements made by him respecting the size and quantity of the timber were untrue; 7. That the defendant did not tell the plaintiff that he had no personal knowledge of the quantity of timber on the lands, and that he got his information in relation thereto from others; 8. That the plaintiff did not, before the execution of the contract, go on the land in question and satisfy himself as to the size and quantity of the timber thereon; 9. That the reasonable cost per thousand feet, under all the circumstances, to have logged the timber on the lands in question during the winter of 1891-92, assuming that there were one million five hundred thousand feet of nine-log timber thereon, would have been two dollars; 10. That it was agreed that the defendant should pay the plaintiff for getting out and placing boom sticks around the logs twenty-five dollars. Thereupon, on motion of the defendant's counsel, it was ordered that such special verdict be set aside and a new trial granted, the costs of the action ³²⁵ to abide the result of the trial, and such order was thereupon entered of record. From that order the plaintiff brings this appeal.

By the written contract between the parties the defendant agreed to pay the plaintiff three dollars per thousand feet for getting in the lumber from the premises described. The jury found that, had there been one million five hundred thousand feet of lumber on such premises as represented by the defendant, the plaintiff could have gotten in such timber, in performance of the contract, at the reasonable cost of two dollars per thousand feet; that is to say, he would have made a profit of fifteen hundred dollars on the performance of the contract, had the facts been as represented by the defendant. In the former judgment, the plaintiff recovered such profits as damages; and upon the last trial, as well as the first, the cause was tried by the court on the theory that the plaintiff was entitled to recover, if at all, such profits as damages. The trial court granted the defendant's motion to set aside the verdict and grant a new trial on the ground that, under the pleadings, the plaintiff was not entitled to such profits as damages.

It appears that at the beginning of the first trial the court sustained a demurrer *ore tenus* to the complaint; that thereupon the plaintiff amended his complaint, to the effect that he was induced to sign the contract on the false and fraudulent

representations of the defendant as to the size and quantity of the timber, as found by the jury, and that, as a matter of fact, there was much less than half the quantity of timber represented on the lands, and that much of that was of inferior size, and hence that it was much more expensive per thousand feet to get in such timber. Among other things, the amended complaint contains this statement: "Plaintiff hereby waives his cause of action for tort herein, and seeks to recover on implied contract." Such amended complaint also contains two other causes of action, each upon express contract.

326 Upon the opening of the trial, "counsel for defendant moved that the plaintiff be required to elect between the first cause of action stated in the complaint and the second and third causes of action, on the ground that the first cause of action is a cause of action sounding in tort, and the second and third causes of action are in contract." But the court denied the motion. The court then admitted testimony as to the amount of such profits, against objection, and the trial judge stated: "I think we will proceed upon the assumption that the man may recover the profits if the proof shows the fraudulent representations as charged"; and further observed that it would be understood that all the testimony offered by the plaintiff bearing upon the question of the right of the plaintiff to recover profits under the contract would be taken under the objection of the defendant, as fully as if an objection were made to each question asked. Such rulings of the court were, manifestly, based upon the fact that the plaintiff had expressly waived the tort alleged in the first cause of action, and upon that cause of action was only seeking to recover upon implied contract, in which during the trial the defendant had acquiesced. In the opinion setting aside the verdict, the trial judge said, in answer to the position of counsel for the plaintiff, that "it was tacitly assumed by court and counsel that plaintiff had made his election, and all their efforts were directed to ascertaining and applying the true measure of damages applicable to such cases. Now it is asserted that, because the court allowed profits to be recovered, it was virtually a decision that the action was in tort. I expressly disclaim any such intention. I was then in doubt as to the true rule as applied to cases of implied contract, and, the profits having been allowed on the former trial without question, I followed the former ruling. This decision was based upon the assumption that profits were allowed in cases of implied contract, and not upon a determination that the action was in tort."

527 The right of a plaintiff to waive the tort and recover solely on the ground of implied contract has been repeatedly and firmly settled by this court: *Barth v. Graf*, 101 Wis. 27, and cases there cited. Such being the state of the record, the only question for consideration is whether the plaintiff could thus waive the tort and recover such profits upon such implied contract. In *Norden v. Jones*, 33 Wis. 605, 606, 14 Am. Rep. 782, Dixon, C. J., quoting approvingly from another case, said: "It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it; and where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received": *Lee v. Campbell*, 77 Wis. 340; *Limited etc. Assn. v. Glendale etc. Assn.*, 99 Wis. 59. As stated in this last case: "The purpose of such an action is not to recover damages, but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." Thus, it has been held that "one may waive the tort and sue on the implied contract only in those cases where the defendant has derived some benefit from the tort": *Webster v. Drinkwater*, 5 Me. 319, 17 Am. Dec. 238. It is not the amount of the plaintiff's loss, but the amount of the defendant's gain, which is recoverable in an action upon an implied contract: *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Keener on Quasi Contracts*, 200. We must hold that, upon the first cause of action alleged, the plaintiff can only recover the amount which the defendant has been enriched or benefited by his false representations.

By the Court. The order of the circuit court is affirmed.

Bardeen, J., took no part.

DAMAGES FOR FALSE REPRESENTATION.—In an action for false representations in the sale of property, real or personal, the measure of damages is the difference between the value thereof as sold and what its value would have been if it had been as represented: *Note to Whiting v. Price*, 70 Am. St. Rep. 266; *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92; extended note to *Cottrill v. Krum*, 18 Am. St. Rep. 562.

MEINHOLD v. WALTERS.

[102 WISCONSIN, 389.]

HOMESTEADS ON PUBLIC LANDS—MORTGAGE PRIOR TO PATENT.—A mortgage given in good faith by one who has entered land as a homestead under the United States statutes, and has acquired the receiver's final certificate, is valid against the mortgagor and those claiming under him, though given prior to the issue of the patent.

C. F. Grow and J. R. Sturdevant & Son, for the appellants.

McCausland & Smith, for the respondent.

³⁸⁹ CASSODAY, C. J. This is an appeal from a judgment of foreclosure and sale in an action commenced April 13, 1895, to foreclose a mortgage bearing date September 8, 1873, executed by A. W. Raymond and wife to J. C. Gwin & Co., to secure eight hundred dollars, and which mortgage was assigned to the plaintiff October 10, 1874. Issue being joined and trial had, the parties stipulated the facts or the court found them to be, in effect, that May 18, 1869, one A. W. Raymond, the mortgagor, made application to enter the lands described as a homestead pursuant to the acts of Congress then in force; that March 6, 1871, he made, executed, and delivered to one Stafford a quitclaim deed of all the pine timber on the lands described, and that deed was recorded March 7, 1871; that March 27, 1873, the final receiver's certificate or receipt was issued to A. W. Raymond for such lands, and such receipt was recorded October 23, 1873; that March 22, 1875, such certificate or receipt was set aside and declared void by the commissioner of the general landoffice of ³⁹¹ the United States; that April 27, 1875, another receiver's certificate or final receipt was issued to him in lieu of the one so set aside, and the same was duly recorded May 10, 1875; that May 7, 1875, the mortgagor and wife, for a valuable consideration, conveyed a part of the lands described to J. C. Gwin & Co., by warranty deed, which was duly recorded May 10, 1875; that May 7, 1875, that firm conveyed the pine timber on another part of the land described to Huntzicker by quitclaim deed, which was recorded June 2, 1875; that the members of the firm and their wives also conveyed the lands, excepting the pine timber, to Huntzicker, by warranty deed, May 29, 1875, which was duly recorded, June 2, 1875; that July 30, 1875, a patent was issued by the United States to A. W. Raymond, covering the lands described; that

subsequently the defendants, respectively, acquired some right, title, or interest in such lands or some portion thereof, so as to be properly made defendants herein; that there is no evidence that J. C. Gwin & Co. or the plaintiff had any knowledge of the execution and delivery of the quitclaim deed of March 6, 1871; that, at the time the mortgage was executed and delivered, J. C. Gwin & Co. had no knowledge of any infirmity, or alleged infirmity in the title to the lands described; that, at the time the mortgage was assigned, the plaintiff herein had no knowledge of any infirmity in the title; that J. C. Gwin & Co. took the mortgage in good faith and for a valuable consideration; that the plaintiff was a purchaser for a valuable consideration, in good faith, of the note and mortgage; that A. W. Raymond was enlisted in the service of the United States as a soldier of the war of the Rebellion between 1861 and 1865; that all of the allegations of the complaint and reply are true; that all of the allegations of the answers and counterclaim are untrue; that there was due at the date of the findings fourteen hundred and fifty-five dollars and seventy-eight cents; also fifty dollars as solicitor's fee, which was therein determined to be a reasonable fee in such a case.

³⁹² As conclusions of law, the court found, in effect, that the plaintiff was entitled to the usual judgment of foreclosure and sale; and from the judgment entered thereon accordingly three of the defendants appeal.

The only question presented in this case is whether the mortgage is valid as against the mortgagor and those claiming under him, or void because it was executed prior to the time when the mortgagor obtained his patent. The question must be resolved according to the federal statutes as construed by the supreme court of the United States: *Paige v. Peters*, 70 Wis. 182, 5 Am. St. Rep. 156; *Wisconsin Cent. Ry. Co. v. Wisconsin River etc. Co.*, 71 Wis. 99; *Whitney v. Detroit etc. Co.*, 78 Wis. 246; *Miller v. Donahue*, 96 Wis. 508. Such statutes required the person making such homestead entry, after the expiration of five years from the time of making such entry, to make proof that he had resided upon or cultivated the premises for the term of five years immediately succeeding the time of filing the affidavit of such entry, and also to make an affidavit that no part of such land had been alienated, except as therein provided: U. S. Rev. Stats., sec. 2291. The exception thus mentioned relates to transfers for church, cemetery, school, or railroad purposes: U. S. Rev. Stats., sec. 2288. Such statutes also provide, in effect,

that no lands acquired for such homestead should "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor": U. S. Rev. Stats., sec. 2296.

This court has held that one who has placed machinery upon land which the purchaser of the machinery has entered as a homestead, but for which he has obtained no patent, cannot enforce a lien upon the land for the payment of the machinery: *Paige v. Peters*, 70 Wis. 178, 5 Am. St. Rep. 156. Subsequently, this court held that a person having made such homestead entry might give a valid mortgage thereon prior to obtaining his patent: *Spiess v. Neuberger*, 71 Wis. 279, 5 Am. St. Rep. 211. In reaching such conclusion, this court followed the prior adjudications ³⁹³ of the supreme court of the United States upon the subject there cited. In one of these adjudications it was said not to have been the purpose of Congress to make the lands themselves inalienable until the patent should be granted, and in another it was expressly held that, "unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title": *Spiess v. Neuberger*, 71 Wis. 286, 5 Am. St. Rep. 211; citing *Lamb v. Davenport*, 18 Wall. 307.

It is contended that such cases have since been practically overruled by the supreme court of the United States. In the case particularly relied upon, it was held that "a contract by a homesteader to convey a portion of the tract when he shall acquire title from the United States is against public policy and void; and it cannot be enforced, although a valuable consideration may have passed to the homesteader from the other party": *Anderson v. Carkins*, 135 U. S. 483. That was an action for specific performance of a contract entered into prior to the entry of the land, and hence, in our judgment, has no application to the case at bar. In a quite recent case it has been held by that court that "in holding that, as between the United States and a homestead settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, the court is not to be understood as expressing an opinion whether, as between the settler and the state, it may not

be deemed to be the property of the settler, and therefore subject to taxation": *Shiver v. United States*, 159 U. S. 492. In a still more recent case it is held that, "as between the government and the settler, the title to public land, until the conditions of the law are fulfilled, remains in the United States, ³⁹⁴ but in the meantime, if the settler is engaged in improving the land as required by law, and disposes of any surplus timber without any intent to defraud the government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the government, the sale is lawful, and the purchaser is protected": *Stone v. United States*, 167 U. S. 178. The receiver's receipt was sufficient prima facie proof of the homestead entry in the landoffice: *Whittaker v. Pendola*, 78 Cal. 296. In the case at bar, the "final receiver's receipt" or certificate was obtained more than five months prior to the execution of the mortgage, and although that receipt or certificate was set aside by the commissioner March 22, 1875, yet another was issued in lieu of it April 27, 1875, and about three months afterward a patent was issued thereon to the man who executed the mortgage. The court found that the mortgage was given and received in good faith, and such findings appear to be supported by the record.

By the Court. The judgment of the circuit court is affirmed.

HOMESTEADS IN PUBLIC LANDS.—A homestead may be claimed in public lands belonging to the United States: *Watterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527. Lands entered under the United States homestead laws are liable to the satisfaction of debts contracted by the homestead claimant between the date of the final certificate of entry and the date of the patent: *Struby-Estabrook etc. Co. v. Davis*, 18 Colo. 98, 36 Am. St. Rep. 266. But see *Faulk v. Cooke*, 19 Oreg. 455, 20 Am. St. Rep. 836.

INGERSOLL v. SEATOFT.

[102 WISCONSIN, 476.]

APPEAL—BONDS ON—RIGHTS OF SURETY.—A surety upon an appeal bond, conditioned for the payment of any judgment finally recovered against his principal, is not entitled, in the absence of fraud, to have a judgment against his principal opened or vacated and to have the right to defend, if his principal has no such right.

J. C. Kerwin, for the appellant.

Thomson, Harshaw & Thompson, for the respondent.

477 CASSODAY, C. J. It appears from the record, in effect, that the plaintiff commenced this action against the Ingersoll Land and Lumber Company, in April 1895, to recover a balance of account for services as general manager of the corporation; that the corporation answered; that the case was twice continued at the request of the corporation; that an amended answer was filed on leave had, and a counterclaim made therein for rent, wrong, fraud, negligence, and malfeasance upon the plaintiff's part, as the corporation's officer, and judgment demanded for a large sum against the plaintiff; that plaintiff replied; that the defendant moved to have the same made more definite and certain, which motion was overruled January 2, 1897; that the corporation appealed therefrom to this court, and upon such appeal the corporation was required to give, and did give, the requisite undertaking, with Henry Sherry and this appellant as sureties, whereby, pursuant to the statute in such case made and provided, they did undertake that the corporation would pay all costs and damages which might be awarded against it on such appeal, not exceeding two hundred and fifty dollars, and did also undertake that, if the plaintiff finally recovered judgment against it in that action, then that it would pay the amount directed to be paid by such final judgment, not exceeding one thousand dollars; that such appeal was dismissed on motion of the plaintiff's attorney, and the cause remanded and noticed for trial at the December term, 1897; that prior to that time the plaintiff, Henry Sherry, and the corporation, had become insolvent, and the corporation and Henry Sherry had each made voluntary assignments for the benefit of their creditors; that the plaintiff and the corporation respectively waived a jury trial, and in open court, February 14, 1898,

agreed to, and the court set the cause down for trial March 29, 1898.

It further appears that March 16, 1898, the corporation's attorneys, having determined that it was unwise to defend the action or prosecute the counterclaim, wrote to the appellant ⁴⁷⁹ that the case would be reached for trial late in March, 1898, and asked what action he would take with reference to the trial; that the appellant thereupon consulted his attorney and directed him to protect his interest; that his attorney was informed that the case would not be taken up until some time in April, 1898; that, without the knowledge of this appellant or his attorney, the corporation, through its attorneys, March 29, 1898, withdrew its counterclaim and suffered judgment to be taken against the corporation for two hundred and eighty dollars damages, together with costs; that July 5, 1898, the attorneys for the corporation consented in writing that this appellant be, and he thereby was, authorized to appear in the name of the corporation in this action or otherwise, and open such judgment, and defend the action, and take such proceedings in that regard as he might think fit or as might be ordered by the court, at his own expense; that the appellant thereupon prepared his petition, verified July 5, 1898, excusing his neglect and claiming a good defense upon the merits, and July 8, 1898, upon such consent and petition and affidavits of himself and his attorney and Benjamin Hooper, J. W. Cameron, and Henry Sherry, obtained an order to show cause why the judgment so entered should not be set aside and vacated and this appellant permitted to defend; that upon the hearing of that application counter-affidavits of the plaintiff and his several attorneys and agents were read, and the motion was finally determined October 11, 1898, when the court ordered that petitioner's motion to open and vacate the judgment, and for permission to defend the action, be, and the same was thereby, denied, with ten dollars costs, and that the order theretofore granted therein staying proceedings be, and the same was thereby, vacated. From that order the petitioner, Seatoft, appeals.

It is conceded that the court denied the application to open the judgment on the ground that, in the absence of ⁴⁷⁹ fraud or collusion, the surety, Seatoft, would have had no right to open the judgment where the principal would not have such right, and that in this case there could be no doubt that the principal would have had no standing in court for such a motion.

We all fully concur in the ruling of the trial court. The

cause had been pending about three years before the judgment was entered. The appeal on which the undertaking was given was from an order refusing to make the plaintiff's reply to the corporation's counterclaim more definite and certain. That undertaking, so signed by this appellant and Henry Sherry, was an absolute agreement in this same action to pay all costs and damages which might be awarded against the corporation on such appeal, and also the amount of any final judgment which the plaintiff might recover therein, not exceeding one thousand dollars. The corporation and Henry Sherry respectively failed and made an assignment for the benefit of their creditors more than four months prior to the entry of the judgment in question. It is admitted that the plaintiff was also insolvent, and that, twelve days prior to the entry of that judgment, the attorneys for the corporation in this action notified the appellant that, under the circumstances, they deemed it unwise to defend the action or prosecute the counterclaim. Such being the facts, it is manifest that there was no fraud or collusion in allowing judgment to be entered as it was; and it is equally manifest that the corporation was in no position to have such judgment vacated. The statutes requiring undertakings to be given upon appeals are remedial, and should be liberally construed to effect their object: *Sutro v. Bigelow*, 31 Wis. 527; *Smith v. Lockwood*, 34 Wis. 72. This court has expressly held that "where a surety has contracted with reference to the conduct of one of the parties to a suit or proceeding in court, he is concluded by the judgment therein": *Shepard v. Pebbles*, 38 Wis. 373. The same principle has been frequently sanctioned by this ⁴⁹⁰ court. So this court has recently held that, "in the absence of fraud or collusion, the sureties on a probate bond are concluded by the decree of the proper court, rendered upon an accounting of their principal, as to the amount of their principal's liability, even though they were not parties to such accounting": *Meyer v. Barth*, 97 Wis. 352, 355, 65 Am. St. Rep. 124, and cases there cited. See, also, *Roberts v. Weadock*, 98 Wis. 405; *Krall v. Libbey*, 53 Wis. 292. The same principle is applicable to this case. Further discussion is unnecessary.

By the Court. The order of the circuit court is affirmed.

APPEAL BONDS—LIABILITY OF SURETIES ON.—The sureties on an appeal bond are not released by the failure of the respondent to prosecute an appeal. That duty devolves on the appellant and his failure to perform it cannot release his sureties: *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842. The fact that an appeal was not taken in time is no defense: Monographic note to

Babcock v. Carter, 67 Am. St. Rep. 200. In the absence of proof of fraud, or of collusion between the appellant and respondent, a surety on an appeal bond is not discharged by the fact that judgment is finally rendered against his principal by agreement between the parties, without his knowledge or consent: **Howell v. Alma Milling Co.**, 38 Neb. 80. 38 Am. St. Rep. 694, and monographic note thereto on the liability of sureties on appeal bonds.

JARVIS v. NORTHWESTERN MUTUAL RELIEF ASSN.

[102 WISCONSIN, 546.]

INSURANCE.—PLEADING, AMENDMENT TO.—A complaint in an action on an insurance policy to recover for an incurable disability permanently incapacitating the insured to perform manual labor, alleging paralysis as the cause of such disability, may be amended so as to allege other and different causes for plaintiff's disability than paralysis, although the claim filed with the insurance company states the cause of disability as paralysis only, and the policy by its terms bars all claims not filed within six months of the maturity of the contract.

INSURANCE.—DUE PROOF of a claim of loss under a policy of insurance means such a statement of facts, reasonably verified, as, if established in court, would prima facie require payment of the claim, and does not mean some particular form of proof which the insurer arbitrarily demands. The statement of one adequate fact in the proofs does not exclude others omitted through mistake or ignorance.

APPEAL.—PRESUMPTIONS ARE IN FAVOR OF THE FINDINGS and conclusions of the trial court, especially when the evidence is conflicting, and such presumptions must prevail unless the weight of evidence is clearly the other way.

Action on an insurance policy to recover the sum stipulated to be paid the insured for an incurable disability rendering him permanently incapacitated to perform any manual labor. The complaint alleged, as the cause of such disability, paralysis. Near the close of the trial, and against defendant's objection, such complaint was amended so as to include disease of the heart and nervous system as additional causes of plaintiff's disability. Judgment for plaintiff and defendant appealed.

F. E. Parkinson, for the appellant.

O. B. Thomas and W. S. Manning, for the respondent.

⁵⁴⁸ **MARSHALL, J.** Appellant's assignments of error requiring notice, though five in number and several of them subdivided, may be properly stated as two: 1. Did the court err in granting the amendment to the complaint, alleging other

causes for plaintiff's disability than paralysis? and 2. Is the finding of fact, on the subject of permanent disability incapacitating plaintiff from performing any manual labor, contrary to the clear preponderance of the evidence?

The ground of objection to the amendment was that the articles of organization of the company barred all claims for benefits not filed in writing with the secretary of the company within six months after maturity of the certificate other than maturity by limitation. That was also a part of the rules and regulations attached to and made a part of the insurance contract. We fail to see how that affected the question of the propriety of the amendment alleging additional facts in support of a claim seasonably filed. The filing of the claim in writing was admitted. The foundation of the claim was total disability to perform manual labor. The amendment broadened out the alleged cause of the disability. That was all. It was not a new claim, but additional facts in support of the old claim. The material thing was total incapacity to perform manual labor because of an incurable disability. A mistake in the real cause of the disability was by no means fatal to the claim, there being nothing in the insurance contract indicating ⁵⁴⁹ any such result. The idea of appellant's counsel seems to be that, if the conditions requisite to the maturity of the contract existed and prima facie proof of them was made assigning an adequate cause therefor, a mistake as to the cause was fatal to a recovery. Such a construction of the insurance contract would be exceedingly unreasonable—would add, we may say, something not found in the language used in the contract by any rational construction of it, and would be contrary to all authority on the question. The contract required due proof of the claim. That gave the assurer, necessarily, authority to require reasonable proof of the existence of the conditions upon which the claim against the company under the contract was based. The term "due proof" did not require any particular form of proof which the assurer might arbitrarily demand, but such a statement of facts, reasonably verified, as, if established in court, would prima facie require payment of the claim. The statement of one adequate fact in the proofs did not exclude others omitted through mistake or ignorance. The same rule applies as in case of a life or fire policy. In the former, death is the essential thing. Assigning in good faith a wrong cause of death, in the proof of the maturity of the policy, is not binding on the beneficiary. So, under a fire

policy, loss by fire is the main thing; but assigning in good faith a wrong cause for the fire in the proof does not preclude a recovery or militate against proof of other causes being produced on the trial under proper pleadings. It is uniformly held that "due proof" calls only for such as the law will pronounce reasonable and satisfactory. This is well illustrated in *Insurance Co. v. Rodel*, 95 U. S. 232, where the requirement in the life policy was that the beneficiary should furnish satisfactory evidence of death and of the justice of the claim of the assured, and excepted from the risk death of the assured by his own hand. The proof showed that the death of the assured occurred that way without suggesting that he was insane at the time. It ⁵⁵⁰ was insisted by the insurance company that there could be no recovery because the proof did not show the existence of facts rendering the company liable notwithstanding the assured died by his own hand. The court, by Mr. Justice Bradley, said in substance that proof of the death of the assured, called for by the insurance contract, did not require a statement of the cause of death, and that even the statement of a cause which prima facie exempted the company from liability was not fatal to an action on the policy; that where proof of death was made and it was not objected to by the company, the call for proofs under the contract was satisfied though they disclosed facts by which the insurer could avoid the policy by a defense to an action on it, and that the beneficiary could recover if the essential fact of death existed and came about by a cause rendering the company liable, though such cause was not fully stated in the proof; that though the proofs showed the existence of facts suggesting to the company the propriety of refusing payment and standing suit, that was no bar to the bringing of a suit; otherwise no suit could be brought until the parties had gone through an extrajudicial investigation resulting favorably to the assured. To the same effect is *Buffalo Loan etc. Co. v. Knights Templar etc. Assn.*, 126 N. Y. 450, 22 Am. St. Rep. 839, where the language of the insurance contract called for satisfactory proofs of death, and it was held that a correct statement of the cause of death was not required; that the beneficiary performed his legal obligation when he furnished due proof of the fact of death. Further on the same subject is *Connecticut Mut. etc. Ins. Co. v. Schwenk*, 94 U. S. 593, where it was held that an incorrect statement of fact in proofs of loss made in good faith does not estop the beneficiary from proving the truth under proper plead-

ings, when a correct statement of the facts in the proofs of loss is not a condition precedent to a recovery on the policy. Doubt is expressed as to that even being sufficient to work a forfeiture. For further ⁵⁵¹ discussion of the subject, see *Bachmeyer v. Mutual etc. Assn.*, 87 Wis. 325; *Parker v. Amazon Ins. Co.*, 34 Wis. 363; *Beach on Insurance*, secs. 1227, 1228; *Joyce on Insurance*, sec. 3319, and cases cited.

It will be noted that in the insurance contract in this case there is no requirement except that due proof of the claim shall be filed, and no language forfeiting the right of recovery for failure to comply with the requirement as to such proof, and in fact no requirement on the subject of proof except that giving the company the right to demand reasonable proof of the maturity of the claim, which, of course, as before indicated, required plaintiff to conform to the reasonable rules of the company by stating in good faith the true situation. So far as the evidence goes in this case, all those requirements seem to have been complied with. It does not appear that plaintiff knew anything about the real cause of his disability at the time he made his proofs, other than that he was suffering from paralysis.

It follows that, on reason and authority, the trial court correctly ruled that the additional facts in respect to plaintiff's disability might be pleaded by way of amendment on the trial, subject to the right of defendant to call witnesses as to such facts and to a continuance for the purpose if necessary. It follows also that evidence in regard to the additional reasons for plaintiff's disability was properly received, and that the facts in that regard were properly considered in determining whether plaintiff was totally disabled from performing manual labor within the meaning of the contract of insurance at the time his claim against the defendant was filed and down to the time of the trial.

On the question of whether the finding of the trial judge, as to whether plaintiff was incurably disabled from performing manual labor as alleged, is contrary to the clear preponderance of the evidence, the conclusion must be in the negative. A careful consideration of the evidence satisfies us that it ⁵⁵² fairly supports the finding. As has often been said, a trial judge has such superior advantages for elucidating the truth from evidence produced before him, over appellate courts that do not hear the witnesses testify, that the presumptions are in favor of his conclusions, and such presumptions must prevail

unless the weight of evidence be manifestly the other way. In saying that it is not intended to carry with it any indication that evidence is not examined here with all the care requisite to an original decision, so far as the circumstances will reasonably permit that to be done; but such circumstances are so inferior to those enjoyed by the judge who sees the witnesses and hears them testify that fair doubts are resolved in favor of his conclusions as the method best calculated to effectuate justice with reasonable certainty.

By the Court. The judgment of the circuit court is affirmed.

PLEADING—AMENDMENT TO.—The true criterion for determining whether an amendment to a complaint is allowable, is to inquire whether the proposed amendment is another cause of controversy, or is upon the same contract or injury: *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385. Amendment of insurance policies: See *Warren v. Ocean Ins. Co.*, 16 Me. 439, 33 Am. Dec. 674.

INSURANCE—PROOF OF LOSS.—An affidavit by the insured describing the premises insured, stating their loss and the date thereof, the amount of damage and of the insurance, and that the cause of the fire is unknown, is a substantial compliance with the terms of a policy requiring the insured to furnish the insurer with proof of loss: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537, 48 Am. St. Rep. 745. The certificate of a magistrate as to the amount of loss is not conclusive on the insured: *Note to Crittenden v. Springfield etc. Ins. Co.*, 39 Am. St. Rep. 826. Duty of insured to furnish the certificate of a magistrate as to his loss: See *Moyer v. Sun Ins. Office*, 176 Pa. St. 579, 53 Am. St. Rep. 690.

APPEAL—PRESUMPTIONS.—The rulings and judgment of the trial court are presumed correct: *Note to Phenix Ins. Co. v. Fuller*, 68 Am. St. Rep. 639.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

HALLMARK v. HOPPER.

[119 ALABAMA, 78.]

PARTIES.—A SUIT BROUGHT IN THE NAME OF "A, AGENT FOR B," is the suit of A, and not of B. The words, "agent for B," are merely descriptive of the person, A, and are superfluous.

PLEADING—AMENDMENT CHANGING PARTY PLAINTIFF.—An amendment which works an entire change of party plaintiff is not allowable. Hence, if an action is brought in the name of "A, agent for B," an amendment by which the action would be made to stand in the name of B, as plaintiff, would work an entire change of party plaintiff, and is not allowable.

PLEADING — AMENDMENT — JUSTICES' COURTS.—The rule prohibiting an amendment which works a change of the sole party plaintiff applies to actions begun before justices of the peace and appealed to other courts.

PARTIES—APPEAL—RECITING WRONG PARTY PLAINTIFF IN BOND—EFFECT OF.—If a suit is brought, in a justice's court, in the name of "A, agent for B," and judgment is rendered in favor of "A, agent for B," the fact that the appeal bond recites a judgment in favor of B does not authorize the suit to be prosecuted, on appeal, in the name of B, as plaintiff, instead of A, the real plaintiff.

Action on a promissory note, commenced before a justice of the peace, by "Waldron Hopper, agent for Neeler Hopper." Judgment was rendered for the plaintiff, and the defendant, Hallmark and others, appealed to the circuit court. The appeal bond was payable to, and recited a judgment in favor of, Neeler Hopper. There was a new complaint filed in the circuit court, but the plaintiff, as before, was therein described as "Waldron Hopper, agent for Neeler Hopper." Upon the defendants' sworn plea that the suit was not brought in the

name of the party really interested, the plaintiff moved, in the circuit court, to amend his complaint by striking out the following words: "Waldron Hopper, agent for," leaving the suit to proceed in the name of Neeler Hopper. The amendment was allowed against the defendants' objection. There was a judgment for the plaintiff and the defendants appealed, complaining of error in permitting the amendment.

Dortch & Martin, for the appellants.

A. E. Goodhue, for the appellee.

⁷⁹ McCLELLAN, J. There can be no question but that a suit brought in the name of A B, "agent for C D," is the suit of A B, and not of C D, and that the words "agent for C D" are merely personally descriptive of A B and superfluous. It is equally clear that an amendment by which such action would be made to stand in the name of C D as plaintiff would work an entire change of party plaintiff, and is therefore, not allowable. And this rule against amendments operating a change of the sole party plaintiff applies to actions begun before justices of the peace and brought by appeal into circuit courts: *Davis Avenue R. R. Co. v. Mallon*, 57 Ala. 168.

Judgment being rendered in such case in favor of A B, agent for C D, the fact that defendants execute an appeal bond reciting a judgment in favor of C D does ⁸⁰ not make it a judgment in favor of C D, nor make C D the party plaintiff in the circuit court, nor justify an amendment of the complaint filed in that court in the name of A B, agent for C D—that is, in the name of A B—substituting C D for A B as the sole party plaintiff: *Sossman v. Price*, 57 Ala. 204.

Reversed and remanded.

PLEADINGS—PARTIES.—AMENDMENTS will not be allowed where they make an entire change of parties: See monographic note to *Flanders v. Cobb*, 51 Am. St. Rep. 427, on what amendments to pleadings are not admissible because they change the cause of action.

PAINTER v. MAULDIN.

[119 ALABAMA, 88.]

GUARDIAN AND WARD—BOND NOT SIGNED BY PRINCIPAL.—A bond given by a guardian, in which the name of the guardian, or principal, appears in the body thereof, but which is not signed by him, is not a statutory bond, and does not, therefore, justify the issuance of an execution against the sureties thereon as provided by the statute.

GUARDIAN AND WARD—INFORMAL BOND—VALIDITY OF, AS A COMMON-LAW BOND.—Although a guardian's bond has not been signed by him, and is not, therefore, a statutory bond, strictly speaking, yet, after it has been approved and acted on, it is good as a common-law liability, upon which the obligors may be sued in a court of law. Hence, after the liability of the guardian to his ward has been fixed, on final settlement, his sureties are also bound.

Motion to quash an execution. Matthews had been appointed as the guardian of Mary Mauldin and Whitefield Mauldin, minors. Painter was one of the sureties on Matthews' bond, which had not been signed by the guardian. A long time after Painter had signed the bond as surety he discovered that Matthews had not signed it, but, upon learning this fact, and that the bond had been approved, without the principal's signature, he immediately disclaimed to the probate judge and to Matthews all liability as surety upon the bond, because the guardian had not signed it. Upon a final settlement of his guardianship, a decree had been rendered against Matthews for six hundred and six dollars and forty-two cents, with a direction that execution issue against him and the sureties on his bond. Execution was levied on Painter's property, and he filed a motion to quash the writ. The court overruled the motion and Painter appealed.

Sollie & Kirkland and Espy & Farmer, for the appellant.

H. H. Blackman, for the appellee.

¶ **COLEMAN, J.** Upon final settlement of his accounts by W. C. Matthews as guardian, execution issued against him and certain parties as sureties on his bond. The appellant moved the court to quash the execution, and the present appeal is prosecuted from the orders and judgment of the court upon the motion to quash the execution. There are several assignments of error, but only two material questions are raised. It is an admitted fact that the guardian himself, the principal, though his name appears in the body of the bond, never signed

the bond; and the facts stated in the motion, which are admitted to be true, show that movant has been guilty of no laches or other acts, which can operate as a waiver of his right to insist upon the defect, if indeed it be such. The question is, whether the sureties are bound, and the court's right to issue execution on the bond. This question has been decided by different courts of great learning, both ways. Some of the authorities may be found cited to the case of *Gay v. Murphy*, 134 Mo. 98, 56 Am. St. Rep. 496, and *Deering v. Moore*, 86 Ma. 181, 41 Am. St. Rep. 534.

It is the opinion of the court that if the bond was not executed by the guardian as principal, as seems to have been admitted; it is not a statutory bond, and did not authorize the issuance of execution against the sureties as provided by the statute. We hold, however, that under the admitted facts, by virtue of section 2282 of the code of 1896, the bond is good as a common-law liability upon which the obligors may be sued in a court of law.

Under the view taken of the character of the bond, it is unnecessary to consider the other question presented by the record.

Reversed and remanded.

OFFICIAL OR STATUTORY BONDS—FAILURE OF PRINCIPAL TO SIGN.—An official or statutory bond not signed by the principal, when purporting to be executed by him, is *prima facie* invalid as to the sureties: *Gay v. Murphy*, 134 Mo. 98, 56 Am. St. Rep. 496. Under such circumstances an administrator's bond has been held to be absolutely void against the sureties, who cannot, therefore, be held answerable for his default: *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 48. A bond executed by a public officer may, however, be good as a voluntary obligation, although it may, for various reasons, not be a valid statutory bond: *Note to State v. Taylor*, 66 Am. St. Rep. 711.

FIRST NATIONAL BANK OF GADSDEN v. WINCHESTER.

[119 ALABAMA, 168.]

CORPORATIONS — ULTRA VIRES CONTRACT OF SURETYSHIP.—Ultra vires executory contracts of corporations are void. Hence, if a contract of suretyship is not within the charter powers of a corporation, a mortgage executed by it to secure notes made by its stockholders, of which there are only two, imposes no enforceable personal obligation upon the corporation, and the mortgage does not divest the corporate entity of its legal title to the property it purports to convey.

CORPORATIONS—EQUITABLE OWNERSHIP.—The legal title to the property of a corporation is in the corporation itself, and not in its shareholders, but in equity the shareholders of private business corporations, where there are no creditors or others interested, are regarded as the equitable or beneficial owners of the corporate property.

CORPORATIONS — PROPERTY — CONCENTRATION OF OWNERSHIP.—When a corporation ceases to be an association of persons by the concentration of its stock into the hands of one owner, the corporation is not thereby dissolved, nor does the sole stockholder thereby become the legal owner of the property. The corporate body, when reduced to one stockholder, is merely in abeyance, ready to resume active functions whenever, by the sole owner's transfer of shares to others, the corporation again becomes a body aggregate.

CORPORATIONS—MORTGAGE OF SAME PROPERTY BY SOLE EQUITABLE OWNERS AND CORPORATION—PRIORITY. When a private business corporation, free from debt, is reduced to two stockholders, who buy out the other stockholders, they have the equitable ownership of the corporate property, and may mortgage it to secure their individual debt for the purchase money. Such a conveyance, though it is also executed by the corporation, passes their interest against the equitable demands of subsequent encumbrancers or purchasers, with notice, from the corporation, and is, therefore, superior to a subsequent mortgage given by the corporation itself on the same property.

A. E. Goodhue, for the appellant.

Dortch & Martin, for the appellee.

¹⁶⁸ **HEAD, J.** The Gadsden Foundry and Machine Works was organized as a body corporate under our general incorporation laws. On March 1, 1887, its only stockholders ¹⁷⁰ were J. E. Line, S. M. Winchester, John Flinn, and William Hagen. On that day, Line and Winchester sold and assigned all their stock in the corporation to their costockholders, Flinn and Hagen, at the agreed price of seven thousand seven hundred and fifty dollars, to be paid in the future, for which seventeen promissory notes, maturing at different times, were given. These notes were not only executed by the purchasers, Flinn and Hagen, but by the corporation also, by and through Flinn, as presi-

dent, and Hagen, as secretary. To secure them, Flinn, Hagen, their wives, and the corporation (the latter acting in its corporate name, by Flinn as president and Hagen as secretary), at the same time executed a mortgage on certain described real and personal property belonging to the corporation, with power of sale, et cetera. This mortgage recited that Flinn and Hagen were the only stockholders of the corporation.

December 24, 1891, the said Gadsden Foundry and Machine Works, to secure an indebtedness of five thousand dollars, evidenced by four described promissory notes then made by it to A. L. Glenn, trustee (the indebtedness being alleged in the bill to have been owing to the complainant), executed to said Glenn, trustee, a mortgage on the same property as that described in said former mortgage, with power of sale, et cetera; and on June 25, 1892, executed another mortgage on a part of the property to the complainant to secure an additional indebtedness of twelve hundred and fifty dollars.

The mortgage of March 1, 1887, to Line and Winchester, was foreclosed under the power, and the mortgagees therein became the purchasers, and have possession of the property as such purchasers.

The bill is filed against the corporation and the said Line and Winchester, by the said second mortgagee praying cancellation of said first mortgage and of the foreclosure thereof; asking foreclosure of its own mortgages, and for general relief.

The respondents, Line and Winchester, moved to dismiss the bill for want of equity, which motion was sustained and the bill dismissed. The cause was not at issue as to the defendant corporation.

It is not disputable that the relation assumed by the corporation, as such, by the execution of the notes and mortgage to Line and Winchester, was that of surety to Flinn and Hagen and that such a contract was not ¹⁷¹ within its charter powers; and under the strict rule so long and often declared by this court rendering void ultra vires executory contracts of corporations, we are constrained to hold that the suretyship so undertaken imposed no enforceable personal obligation upon the corporation, and that the mortgage did not divest the corporate entity of its legal title to the property it purported to convey: *Smith v. Alabama Life Ins. Co.*, 4 Ala. 558; *Grand Lodge v. Waddill*, 36 Ala. 313; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Central R. R. etc. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Wilks v. Georgia Pac.*

B. R. Co., 79 Ala. 180; Westinghouse Machine Co. v. Wilkin-son, 79 Ala. 312; Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695; Chewacla Lime Works v. Dismukes, 87 Ala. 344; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931; Lanier Lumber Co. v. Rees, 103 Ala. 622, 49 Am. St. Rep. 57. Personal obligation, however, for the payment of the debt rested upon Flinn and Hagen, the debtors, and were by them expressly assumed in and by the notes and mortgage they executed, and it is not to be questioned, of course, that whatever vendible interest they had in the property, if any, passed by the mortgage for the purposes of the intended security, unless some rule of public policy, applicable to the case, forbade it.

The question then is, What interest had Flinn and Hagen in the property which by law they were competent to transfer as security for their individual debt, and what the relative rights of their mortgagees and the said subsequent encumbrancers, with notice, created by the corporation itself acting within its charter powers?

As we have seen, Flinn and Hagen, when they executed the notes and mortgage now assailed, were the only stockholders of the corporation, and there were no creditors or other parties in interest to be affected. It was purely a private business corporation, organized solely for the profit of the stockholders, and in nowise to serve the public.

There seems to be no contrariety of opinion among text-writers and courts to the effect that the shareholders of private business corporations, where there are no creditors or others interested, are the beneficial owners of the corporate property. Morawetz, an authority of distinction on this branch of the law, says: "A private corporation is in reality a voluntary association, formed ¹⁷² by agreement of its members for the purposes set forth in their charter. The real or beneficial ownership of everything belonging to an ordinary trading corporation is in the persons who compose it. Each stockholder has an equitable interest in the corporate affairs; and this interest must be managed in accordance with the provisions of the charter, by the agents appointed to act for the whole association. The courts of law, however," he says, "recognize a corporation only as one body, acting in the corporate name. The individual stockholders are not, in contemplation of law, parties to contracts made by the association in a corporate capacity, nor have they any legal right or title to property vested in the corporation. At law, a corporation and its stockholders are

considered as distinct from each other; and the contractual relation between the stockholders is wholly ignored. It thus appears that the courts of law are, in many cases, unable to protect the rights of stockholders of a corporation, and that the assistance of chancery is necessary to the attainment of justice. "The relation between a corporation and its several members," he continues, "may, for all practical purposes, be treated as that of trustee and cestui que trust. In contemplation of law the property and rights of an incorporated association belongs to the united association acting in the corporate name, and not to its stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be enforced by the courts of equity."

The principle here stated, that the legal title to the property of the corporation is in the corporation itself, and not the shareholders, cannot, of course, be questioned, and the authorities, for the most part, go so far as to hold that even when the body ceases to be an association of persons by reason of the concentration of all the stock in the hands of one owner, the corporation is not thereby dissolved, and the sole stockholder does not thereby become legal owner of the property: *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131. There being with us no such entity as a corporation sole, the corporate body, when reduced to one stockholder, is said to be in abeyance merely, ready to resume active functions whenever, by transfers of shares to others by the sole owner, it becomes again a body aggregate. It is abeyance, ¹⁷³ not dissolution and restoration to the shareholder of legal ownership: *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335; *Cook on Stock and Stockholders*, 2d ed., sec. 631; *Morawetz on Private Corporations*, 635.

But now we are in a court of equity inquiring of equitable ownership. It seems to us to be logically necessary that Morawetz and other authors and courts should hold to the doctrine that a corporation of the nature of this is the legal representative of those who contribute the capital, or their successors, holding and managing for their private use and benefit, and that the latter (there being no creditor or other holder of a superior right to be consulted) are necessarily equitable owners of the corporate property. It is true that, for the purposes of the charter, the corporation is the legal and equitable proprietor. If, to enforce a right, or redress a wrong in respect of corporate property, a resort to a court of equity be essen-

tial, the corporation itself may sue in that forum and the presence of the stockholders before the court is not required. The corporation represents the entire estate. But that presupposes a case where no antagonistic relation to the corporation, set up by the unanimous act of the stockholders, is the subject matter of investigation. A conflict of that character presents a different question. We are, in that case, required to consider how far the unanimous voice of the stockholders may modify or control corporate action in reference to the management and disposition of corporate property. Such is the question here presented. All the stockholders mortgaged the property to secure their debt, and the substantial, beneficial ownership being necessarily in them and held by the artificial creature of the law, the corporation, for their exclusive behoof, we hold that their conveyance passed that interest against the equitable demands of subsequent purchasers or encumbrancers with notice from the corporation. We have, in support of this conclusion, an elaborate discussion, leading to the same result, by the court of appeals of Maryland, in *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336. It was there held that a purchaser of shares of stock from one who owned all the stock of the company was bound in equity by a mortgage executed by the sole owner while such, upon the corporate property. At the time *Flinn and Hagen* executed the mortgage assailed, ¹⁷⁴ being the only parties interested, they had the right to procure at once, without the power of successful resistance from any source, a dissolution of the charter and restoration of themselves to their legal ownerships. Such dissolution was necessary only as it concerned the legal ownership. They already had the beneficial estate, and, having it, could dispose of it. Mr. Thompson, in his work on Corporations, approves *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, and adds, if the sole owner may convey the corporate property, in equity, no reason is perceived why all the stockholders, however numerous, may not accomplish the same result by their joint deed: 4 Thompson on Corporations, sec. 5096. We hold that, in equity, the mortgage to Line and Winchester is superior to those of the complainant on the same property.

There was some property embraced in the mortgage of the First National Bank which was not included in the prior mortgage to Winchester and Line, and it is insisted by the complainants that this bill should be retained for foreclosure in respect to that additional property. This is true, so far as the Gadsden

Foundry and Machine Works and the complainants are concerned, but Winchester and Line have no interest in that question. As we have seen, the cause is not at issue as to the foundry and machine works, and the motion to dismiss for want of equity, which the chancellor sustained, and from which this appeal is taken, was made only by Winchester and Line. The effect of the decree appealed from was, it would seem, to dismiss the bill only as to Winchester and Line, leaving the case open for future issue as against the respondent, the foundry and machine works. At any rate, we will expressly modify the decree of dismissal so as to show that it operates only as to Winchester and Line.

By the foreclosure of the mortgage to Winchester and Line, the condition annexed to it became discharged, and the complete equitable title to the property vested in Winchester and Line, who purchased at their own sale subject only to the right of seasonable disaffirmance. This is not a bill for the purpose of disaffirmance or redemption. The decree of the chancellor as modified is affirmed.

CORPORATIONS—ULTRA VIRES CONTRACT OF SURETYSHIP—VALIDITY OF.—Contracts of guaranty or suretyship, entered into by a corporation, not in furtherance of its business, are ultra vires, unless express authority exists to make such contracts: See monographic note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 164, on the doctrine of ultra vires in relation to the contracts of private corporations.

CORPORATIONS.—THE PURCHASE, BY ONE STOCKHOLDER, of all the stock of a corporation does not dissolve the corporation, and place all the corporate property on the same footing with the other estate of the individual stockholder. The effect of such a purchase is merely to suspend the franchise of the corporation until the stock may be transferred to others: *Louisville etc. Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335. But see the note to this case.

CORPORATIONS—CHANGE IN STOCKHOLDERS—EFFECT OF.—A change in the stockholders of a corporation has no effect upon its legal status. It remains, through all changes in the personnel of its stockholders, the same legal entity, possessed of the same rights, and subject to the same liabilities: *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798.

CORPORATIONS—STOCK OWNED BY ONE—MORTGAGE.—If one person becomes the sole owner of all the stock of a private corporation, he may make a valid mortgage of all the property, and subsequent purchasers of stock from him will hold in subjection to it: *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336. One who becomes the owner of all the capital stock of a private corporation does not thereby become owner of its property: *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131.

YATES v. ADAMS.

[119 ALABAMA, 245.]

HOMESTEAD—EXEMPTION IN PROCEEDS OF PROPERTY FRAUDULENTLY CONVEYED TO THE GRANTOR'S WIFE.—If a husband owns a lot, and, being in debt, voluntarily conveys it to his wife, who sells it and invests the proceeds, in her own name, in other land, on which the wife erects a house, which both occupy as a home, the husband may, upon a bill brought against him by his creditors to condemn his conveyance as fraudulent and to subject the proceeds to execution, claim a homestead in the land upon which he and his wife are living, although the property conveyed by him was not, and never had been, his homestead.

Bill in equity to condemn the proceeds of land fraudulently conveyed, which was dismissed on the ground that the complainant was not entitled to relief. The complainant appealed.

E. E. Blackburn, for the appellant.

Cabaniss & Weakley, for the appellee.

245 **HEAD, J.** The views of the other members of the court upon the validity of the claim of homestead asserted in this case being the contrary of those of the writer, the following discussion of the question against the validity of the claim indicates the opinion of the writer only. The other members of the court hold that A. A. Adams was entitled to the exemption claimed, and such will be the decree of the court.

The case is a bill in equity to condemn proceeds of property alleged to have been fraudulently conveyed, in the possession of the alleged fraudulent grantee.

A. A. Adams being indebted to the complainant, and owing other debts, on May 26, 1890, conveyed to his wife, Carrie W. Adams, by deed, a lot of land on Thirteenth street, in Birmingham, Alabama, which he owned. The consideration recited in the deed was three thousand dollars in hand paid. There was, in fact, no valuable consideration at all. The property was, at that time, subject to the payment of Adams' debts. It was not, and had never been, his homestead. In July following, Adams and wife conveyed, by deed, one-half of this lot to James R. Adams for the recited consideration of two thousand two hundred and fifty dollars, in hand, and about the same time James R. Adams and wife conveyed by deed to said Carrie W. Adams another lot, located in another part of the city known as South Highlands, for the recited consideration of two thousand five hundred dollars. In fact, however, these con-

veyances were, respectively, made in consideration of each other, operating as an exchange of lots. To make up the difference between the estimated values of the two lots as denoted by the considerations recited, A. A. Adams transferred to James R. a half interest he owned in some lots in Calera, valued at two hundred and fifty dollars. Very shortly after this exchange, Mrs. Adams erected a dwelling-house on the lot obtained by her, at a cost of some eighteen hundred dollars, the money being raised by selling the other half of the Thirteenth street lot for eight hundred dollars, and borrowing one thousand dollars, which was secured by mortgage on the South Highlands lot. Upon completion of the house, in the latter part of 1890, she moved into it, as her home, and has since continuously occupied it as such, her husband living there with her.

The bill seeks to condemn this lot—the South Highlands lot—as being the proceeds of the Thirteenth street property, voluntarily conveyed to Mrs. Adams, as aforesaid, ²⁴⁶ and the only resistance offered to the relief sought is a claim of homestead exemption interposed by the husband, A. A. Adams, claiming that, by virtue of his occupation of it, with his wife, as his dwelling-place, which commenced on the completion of the house, before this bill was filed, and the fact, as he alleged and proved, that the property was not, at the hearing, worth as much as two thousand dollars, after deducting the amount of the mortgage encumbrance, the principal of which was still unpaid, he was entitled to claim and hold the same under the homestead exemption law.

We think, upon principles recognized and established by this court, and a proper view of the marital relation, so far as concerns the separate property of the wife under present statutes, the claim of exemption cannot be allowed. The property was never impressed with a homestead character in favor of Adams. The lot he conveyed to Mrs. Adams was not his homestead and had never been. It was subject to the claim of his creditors. He conveyed it voluntarily to Mrs. Adams, in that plight, and she took it as upon a trust in invitum for the use of those creditors if they should see proper to enforce the trust. The right of the creditors to proceed in equity to condemn the estate, grew out of, and was created by, the execution of the constructively fraudulent deed—was coincident with such execution, and irrevocable. Nothing that either the grantor or grantee could afterward do could affect or impair the rights of the creditors so created and fixed by the conveyance, except to sell to a bona fide purchaser for value without notice of the

character of the consideration. These principles are to be found stated in *Lockard v. Nash*, 64 Ala. 385, where *Brickell, C. J.*, speaking for the court, in reference to a gift by a debtor to his son, said: "An existing creditor can compel the application of the money received to the satisfaction of the donor's debt. The right of the creditor does not spring out of any contract between him and the donee. It arises by operation of law, upon the broad principle that justice must precede generosity, and that the claims of creditors, who have parted with a valuable consideration, must be satisfied before the claims of others, resting merely on affection or generosity, can be recognized. The money derived from the sale of the cotton was money held by the donee ²⁴⁷ in trust for existing creditors. The liability of applying it to their satisfaction arose, and was complete, on the day it was received. The trust was implied, or constructive; it was created by the law; it was imposed on the donee in invitum." And he went on to state that it was a trust to which the statute of limitations was applicable.

The same principle was stated, with more elaboration, in *Dickinson v. National Bank etc.*, 98 Ala. 546. We there held that the fraudulent grantee is construed to be a trustee for creditors, and, as such, responsible for his acts in disposing of the property conveyed to him. We held that, if he had parted with the property, he must account for its value, which liability could be enforced by personal decree and execution; and that the proceeds of the property may be followed into any property in which they have been invested, so far as they can be traced. As we there stated, the rules laid down are consonant with the authorities generally, and meet our approval. They must be regarded as the established doctrine of this court. See, also, the reasoning and authorities stated in *Kennedy v. First Nat. Bank*, 107 Ala. 170, where it was held that a grantor in a fraudulent conveyance of property, in which the right of homestead existed at the time of the conveyance, was entitled to assert the homestead right in a suit by creditors to condemn the property.

Adams, having no homestead right in the property, at the time of his conveyance (which under the authority of *Kennedy v. First Nat. Bank*, 107 Ala. 170, might have given him the right to claim the exemption he now claims), could not, and, indeed, did not attempt to, acquire one thereafter. *Mrs. Adams* being as against him the absolute owner, converted the property into other property, in which he had no right, title,

or interest, nor legal or equitable right of possession or enjoyment whatever; and it goes without saying that in such property he could have no homestead right under the statutes of this state. His occupancy of it as a dwelling-place, with his wife, was not by virtue of any proprietary interest of any character in him, but, in a legal sense, by the mere permission or sufferance of his wife. By such occupancy he acquired no more right of homestead under our exemption laws than if he had, by the permission of the owner, ²⁴⁸ lived with, and in the house of, a stranger. Suppose Mrs. Adams had exchanged the lot conveyed to her by her husband for the furniture with which her house was supplied, the use and benefit of which her husband enjoyed by living there with her, what would be said of a claim on his part to have two thousand dollars' worth of the furniture set apart to him as exempt? The present case is precisely the same in principle.

The distinction must be borne in mind between this case and those in which the grantor in the fraudulent conveyance had a right of homestead, at the time of the conveyance, by reason of his occupancy of the property as such. If he had such right, then he may claim homestead when the conveyance is assailed by creditors; if he had no such right; if the property was then subject to the claims of creditors, the conveyance was, necessarily, void in toto as against creditors, and there could be no homestead right for him to assert.

Following the views of the other members of the court, the decree of the city court is affirmed.

HOMESTEAD—CONVEYANCE OF.—A fraud on creditors cannot result from the conveyance of a homestead: *Gray v. Patterson*, 65 Ark. 373, 67 Am. St. Rep. 937.

HOMESTEAD IN PROPERTY FRAUDULENTLY CONVEYED. Though a husband voluntarily conveys land to his wife to hinder and delay his creditors, her right to a homestead therein is not lost: *Ruohs v. Hooke*, 3 Lea, 302, 31 Am. Rep. 642, and note, showing that when a conveyance is set aside for fraud, at the suit of the grantor's creditors, he is not estopped, as against them, to assert his claim of homestead in the property embraced in the deed.

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LANFORD v. LEE.

[119 ALABAMA, 243.]

ESTATES OF DECEDENTS—EXEMPTION FROM ADMINISTRATION IN FAVOR OF WIDOW AND MINOR CHILDREN.—

When a statute grants an exemption of personal property from administration and the payment of debts, in favor of the widow and "minor" children of a decedent, it is minority—the condition of being under the age of twenty-one years—and that alone, without regard to any other condition or relation, upon which the right of a child to share in the exemption depends. Hence, a daughter, though married and over eighteen years of age, is entitled to share in the exemption, where she is under twenty-one years of age.

EXEMPTION FROM ADMINISTRATION—TRUST FOR

CHILDREN.—Under a statute which grants an exemption of personal property from administration and the payment of debts, in favor of the widow and minor children of a decedent, and which requires the property to be delivered to the widow, "to be by her employed or used in maintenance of herself and minor children," the exemption, when set apart, must be delivered to the widow, if there is one, and to her only, but she takes and holds it impressed with the trust so prescribed by the statute. Her title or interest in the property is not exclusive, but is in common with that of the minor child or children, and she cannot, therefore, use or appropriate it exclusively for her own benefit.

EXEMPTION FROM ADMINISTRATION—EXISTENCE OF

FAMILY RELATION.—Under a statute which grants an exemption of personal property from administration and the payment of debts, in favor of the widow and minor children of a decedent, she and they are entitled to the exemption, not as incident to the social relation of a family, but because of the status of widowhood and minority, and they are entitled to take and hold it, in the condition in which they are found, whether they are living together in such relation or not. The right to the exemption is not lost because the social relation of a family does not exist. If that relation has been dissolved by a child "leaving the family," such child takes, in severalty, its share of the unconsumed exemption; and if, for any other reason, such relation does not exist, the child has the same right that it would have upon "leaving the family."

ASSUMPSIT—MONEY HAD AND RECEIVED—EXEMPTION FROM ADMINISTRATION.—

Whenever a defendant has money which, *ex aequo et bono*, belongs to the plaintiff, an action for money had and received may be supported. Hence, if a testator dies, leaving a widow, with whom he was not living at the time of his death, and a married daughter under twenty-one years of age, but no family relation exists between the widow and daughter, and a personal property exemption, of the value of one thousand dollars, is set apart to them, which property is delivered to the widow and converted by her into money, which she claims as her own, exclusively, one-half of the money so received by her becomes, at the election of the daughter, money had and received to the latter's use, for the recovery of which she may maintain assumpsit.

Assumpsit for money had and received. The purpose of the suit was to recover the exemption of a minor child, and it was brought by the appellee, Lee, immediately on her arrival at

twenty-one years of age. One count of the complaint was in **assumpsit** and the other set forth the facts. A demurrer was **overruled** and judgment rendered for the plaintiff. The defendant appealed.

Pitts, Pitts & Saffold, for the appellant.

J. C. Compton and Mallory & McLeod, for the appellee.

²⁵³ BRICKELL, C. J. Reason H. Lanford, a resident citizen of the county of Dallas, died therein, on the nineteenth day of July, 1896, leaving a last will and testament, which after his death was admitted to probate in the court of probate in the county of his residence. The executors therein named duly qualified and letters testamentary were issued to them. The testator left surviving a widow, the appellant, and an only child, the appellee. At the time of his death, the appellant was not living with the testator, but was living separate from him, and had been for more than eleven months, without this state, and did not return here until after his death. At his death the testator was residing with the appellee, a married woman, more than eighteen but under twenty-one years of age. While the relation of step-mother and step-daughter existed between appellant and appellee, there was no social relation, in the sense or which could be regarded as a living together in the relation of a family.

Upon the claim and selection of the appellant as widow, there was set apart to her, by proper proceedings in the court of probate, for the use of herself as widow, and for the use of appellee as the minor child of the testator, from the personal assets of the testator, as ²⁵³ exempt from administration, money, choses in action, and cotton, aggregating one thousand dollars. On the day these assets were received by the appellant, she made sale thereof (except the money), for a sum which she received, and which when added to the money amounted to one thousand dollars. Thereupon the appellee demanded of the appellant one-half of the money so received, but payment thereof was refused, the appellant claiming she was entitled to the entire exemption.

Exemptions of personal property from administration are purely statutory. They are derived from and dependent upon statutes. The statute under which the exemption was claimed, and was set apart by the proceedings in the court of probate, is section 2546 of the code of 1886, incorporated as section

2073 of the code of 1896. It provides an additional exemption to the exemption of specific personal property provided for in the section immediately preceding, and reads: "In favor of such widow and minor child or children, or either, there shall also be exempt from administration and the payment of such debts, personal property belonging to such decedent at the time of his death, to the amount of one thousand dollars in value, to be selected and set apart for them; but if the estate is solvent, the value of such property so selected and set apart shall be, on final settlement and distribution of the estate, credited on the distributive shares of the widow and children receiving the benefit thereof, or on their respective legacies, if by will disposition is made of the entire estate; and any of such children, on leaving the family, shall be entitled to an equal share of the property so exempt, and then on hand."

The contention of the appellant is reducible to, and dependent upon, two propositions—the first of which is, that as the appellee, at the death of the testator, was married and above the age of eighteen, though under the age of twenty-one years, she is not a minor child, within the meaning of the statute, entitled to share in the exemption; the second is, that as the testator had not at his death a family, and as the social relation of a family did not exist, the appellee is not in the category of a minor child, "leaving the family," and of consequence is not entitled to share in the exemption.

As to the first proposition, the words of the statute are ²⁰⁷⁴ plain and unambiguous as to the status of the child, or children, who are entitled to take the exemption in common with the widow. The status is simply and exclusively minority, under the age of twenty-one years; and there is no authority in the courts to interpolate the word "unmarried," if, as in the present case, the child be a female; nor if a male the words "who had not been relieved from the disability of nonage." Yet, when reduced to the last analysis, this is the proposition upon which, in this respect, the contention of the appellant rests. The statute cannot be misapprehended—it is minority, the condition of being under the age of twenty-one years, and that alone, without regard to any other condition or relation, upon which the right of the child to share in the exemption depends.

As to the second proposition. When the exemption is set apart, the requirement of the statute is, that the property shall be delivered to the widow, "to be by her employed or used in maintenance of herself and minor children." There may be a

guardian of the child, entitled to take and hold any other and all other personal property of the child; but, if there be a widow, the exemption must be delivered to her, and to her only: Code 1886, sec. 2547; Code 1896, sec. 2075. But she takes and holds it impressed with the trust that she will "employ or use it in maintenance of herself and minor children"; she cannot use it or appropriate it exclusively for her own benefit; she has in it no exclusive title or interest; her title and interest is in common with the title or interest of the minor child or children. The words of the statute, if narrowly construed, would seem to import that the widow and minor children are living together in the social relation of a family, and that, on "leaving the family," a child, whether of full age, or continuing in minority, shall be entitled to an equal share of the exemption as it then remains, unconsumed in the maintenance of the widow and the child or children. If the construction be adopted that the social relation of family must exist, or a child cannot share in the exemption, the construction must be applied to the widow also, and when she is living separate and apart from the children she cannot claim or take the exemption, for she can take only in common with the minor child or children. Such child or children living, ²⁵⁵ there is no contingency or event in which the widow can take to their exclusion. But this is too narrow a construction of the statute; it is entitled to and must receive a liberal construction—a construction which will promote and consummate the legislative intention, as distinguished from a mere literal construction, which may operate to lessen or defeat it. The plain purpose, the primary and controlling intention, was to provide an exemption for the widow and minor child or children, not exceeding in value one thousand dollars. If the social relation of a family exists between them, its continuance is contemplated, but not compelled. There may be dissolution of it, by a child "leaving the family," and when that event occurs, the child leaving takes in severalty her share of the exemption. But if the social relation of a family does not exist, the right to the exemption is not lost. The widow and minor children are entitled to it, not as an incident to the relation of family, but because of the status of widowhood and minority, and they are entitled to take and hold it, in the condition in which they are found. The widow receives possession of the exemption; it must be delivered to her; but her title is not enlarged, nor that of the minor child or children lessened. The social rela-

tion of family not existing, the minor child or children have the rights which they would have if the social relation existed, and they were "leaving the family." The exemption, nor any part of it, having been applied to their maintenance, nor occasion for its application existing, they would be entitled to share in the exemption equally with the widow.

In this case, the widow having converted the exemption *ex instanti* its delivery into money, it was her duty to pay the appellee one-half thereof. Refusing to pay, and claiming the exemption as her own exclusively, the money received by her, at the election of the appellee, became money had and received to her use, for the recovery of which she could maintain *assumpsit*. Whenever a defendant has money which *ex equo et bono* belongs to the plaintiff, the action for money had and received may be supported: 1 Brickell's Digest, sec. 72, p. 140. These conclusions lead to an affirmance of the judgment of the city court.

Affirmed.

ASSUMPSIT—MONEY HAD AND RECEIVED.—An action for money had and received may be maintained by one person against another, when the latter has money to which in equity and good conscience the former is entitled: Note to Merchants' etc. Nat. Bank v. Barnes, 56 Am. St. Rep. 591.

TREADWELL v. TORBERT.

[119 ALABAMA, 279.]

EQUITY—PARTIES IN PARI DELICTO.—The law leaves all who share in the guilt of an illegal or immoral transaction where it finds them. It will neither lend its aid to enforce contracts, while executory, forming part of the transaction; nor will it undo or rescind such contracts when executed.

EQUITY—DEED GIVEN IN CONSIDERATION OF COMPOUNDING A FELONY.—If a married woman makes a deed of her separate estate, in consideration that the grantee will suppress a pending prosecution against her husband for a felony, a court of equity will not cancel it for illegality of consideration.

Bill in equity to cancel a conveyance for illegality of consideration, brought by Fannie O. Treadwell, a married woman, against C. C. Torbert. Mrs. Treadwell's husband had been arrested upon a charge of obtaining money by false pretenses, and she conveyed to Torbert certain land, which was her separate estate, to procure the discharge of her husband from such

charge. In consideration of this deed Torbert agreed to stop the criminal prosecution and dismiss it. This was done, and it appears to have been the only consideration for the deed. The complainant prayed that the deed be declared void and that it be canceled. Upon the respondent's motion, the bill was dismissed for want of equity, and the complainant appealed.

W. O. Mulkey, for the appellant.

George P. Harrison, for the appellee.

²⁸¹ BRICKELL, C. J. If the facts stated in the bill (or petition, as it is styled) were embodied in an indictment, they would constitute the offense of compounding felony, as it is described in the statute: Crim. Code 1896, sec. 4427. The general doctrine prevailing in courts of law and of equity is, that the law leaves all who share in the guilt of an illegal or immoral transaction where it finds them. It will neither lend its aid to enforce contracts, while executory, forming part of the transaction; nor will it undo or rescind such contracts when executed, 3 Brickell's Digest, 144-147. The case made by the bill falls within this doctrine, and is, in all respects, strictly analogous to Clark v. Colbert, 67 Ala. 92. It may be matter of regret now, with the complainant, that she parted with her land to procure the discharge of her ²⁸² husband from prosecution for the grave criminal charge preferred against him, and for which he was under arrest. The courts are bound to leave her where they find her. As was said in a kindred case: "If men, in consummation of frauds, employ instruments binding and conclusive in their legal operation and effect, it is sound reason, good policy, sheer justice, to leave them where they have placed themselves, bound as they have bound themselves, without assistance from the courts to unloose them, when it becomes their interest to be unloosed, encouraging them and others to commit similar frauds": Williams v. Higgins, 69 Ala. 517. The decree of the chancellor must be affirmed.

EQUITY—PARTIES IN PARI DELICTO—ILLEGAL TRANSACTION.—Parties in pari delicto are not entitled to relief in equity. The court must refuse to aid either, and must leave them where, by their illegal acts, they have placed themselves: Markley v. Mineral City, 58 Ohio St. 430, 65 Am. St. Rep. 776; note to Harper v. Harper, 7 Am. St. Rep. 587; Gist v. Western Union Tel. Co., 45 S. C. 344, 55 Am. St. Rep. 763.

GREENE v. DICKSON.

[119 ALABAMA, 346.]

EQUITY — REFORMATION OF WRITTEN INSTRUMENTS.—Courts of equity alone have jurisdiction to reform written instruments, and will always grant relief upon a proper bill, supported by sufficient proof.

EQUITY — REFORMATION OF DEED—REMEDY AT LAW.—The fact that a defect in a deed is of such a character that it may be aided by parol, and thereby be made available in defense to a suit at law, does not take away the jurisdiction of equity to reform it.

EQUITY — REFORMATION OF WRITTEN INSTRUMENTS, WHEN PROPER.—So long as a party who holds under a written instrument is dependent upon parol testimony to supply its defects, and is exposed to the hazard of losing the benefit of his written muniment by the loss of such parol evidence, he is entitled to the aid of a court of equity, to perfect the written muniment.

EQUITY — REFORMATION OF DESCRIPTION IN A DEED.—Although a deed may be void on its face for want of a definite description of the land, a court of equity will reform it upon proper allegations and proof of extrinsic facts; as, where lands are described as "part" of a quarter section named, containing eighty-eight acres, but no particular eighty-eight acres of the one hundred and sixty acres is specified or pointed out.

EQUITY PRACTICE—AMENDMENT OF BILL.—The averment of extrinsic facts to reform a deed is amendable, if the facts warrant the amendment, and, upon a motion to dismiss, for want of equity, the amendment must be considered as made.

Bill in equity to reform a conveyance of land. The court sustained a demurrer thereto, dissolved the injunction, and dismissed the bill. The complainant appealed.

Davis & Haralson, for the appellant.

H. W. Carden and C. Daniel, for the appellee.

³⁴⁷ COLEMAN, J. The appellant filed the present bill for the purpose of having a description of lands, as made in a deed of trust, reformed and corrected, and to enjoin the prosecution of a suit in ejectment, instituted by respondents to recover the possession of the lands from complainant. Courts of equity alone have jurisdiction to reform written instruments, and will always grant relief upon a proper bill, supported by sufficient proof. ³⁴⁸ Even though the defect in a deed is of such a character that it may be aided by parol and thereby made available in defense to a suit at law, this fact does not take away the jurisdiction of the court. So long as the party holding under a written instrument is dependent upon parol testimony and is exposed to the hazard of losing the benefit of his written muni-

ment, by the loss of such parol evidence, he is entitled to the aid of a court of equity to perfect the written muniment. This is the better rule.

The ancestor of respondents executed a deed of trust to secure the payment of a loan of money. The deed of trust was foreclosed and complainant purchased the land and received a deed from the trustee. The land is described in the deed as part of northwest quarter of section 4, township 9, range 10, containing eighty-eight acres, and the southeast quarter of the southeast quarter of and the northeast quarter of the southeast quarter of section 32, township 8, range 10, containing altogether one hundred and sixty-eight acres. Neither county nor state is mentioned. Although under previous decisions of this court (*Chambers v. Ringstaff*, 69 Ala. 140, and cases following it), it would have been permissible in a court of law, by proof of proper extrinsic facts, to have aided the imperfect description, in having omitted the county and state in which the lands are situated, the proof of these facts, resting in parol, did not take away the jurisdiction of a court of equity to reform the deed for the benefit of complainant. The important question arises, from the defective or imperfect description of the eighty-eight acres in section 4, township 9, range 10. We have no doubt that on its face in a court of law, the deed would be held void, for the reason that no particular eighty-eight acres of the one hundred and sixty acres constituting the quarter section, is specified or pointed out. It does not follow, at least in this state, that because a deed is void on its face, and would be so held in a court of law, and that there is a patent ambiguity in the description, that a court of equity, under no circumstances, will receive parol evidence, and reform the instrument. In the case of *Chambers v. Ringstaff*, 69 Ala. 140, it was said there are "exceptional shadings of ambiguity," and by Judge Story it is said "there is an intermediate class of cases, partaking of both patent and latent ^{and} ambiguity." In the *Ringstaff* case parol evidence was received to show that at the time of the execution of the mortgage, the mortgagor resided upon and owned a tract of land in Montgomery county, Alabama, which corresponded with the lands described in the mortgage, and that she owned no other lands at the time, and it was held that such proof remedied the imperfection which arose from an omission to state the county or state in which the lands were located. In the case of *Meyer v. Mitchell*, 75 Ala. 475, which was a bill for specific performance, the lands were described as "sixty acres of land, viz.,

fifty acres Comida and Cone Bottom; also ten acres hillside woodland, joining the Mitchell tract." This court said that there could be "but little doubt, that the description of the land agreed to be conveyed set out in the written agreement is void for uncertainty, standing alone, unaided by other and extraneous evidence, identifying the subject matter of the sale."

In the case cited, although the proof was sufficient to authorize relief, the case was reversed because there were no proper allegations in the bill.

In the case of *O'Neal v. Seixas*, 85 Ala. 80, a case often cited in our reports, the bill was filed for reformation of the mortgage and foreclosure. The land conveyed was described as "a lot of land near Florence, north of the Fair Grounds, containing thirty-five acres, more or less." The bill was demurred to, as in the case under consideration, upon the ground that the description of the land contained in the mortgage was too indefinite, and that it was void. Commenting on the demurrer, *Somerville, J.*, for the court used the following language: "A more accurate description of it is given in the bill, coupled with the averment that this was the only such lot situated in that locality, of which the mortgagor was seised and possessed at the time of the execution of the mortgage. The description is not so vague and indefinite as to be incapable of being aided by parol evidence of identification when read in the light of the circumstances surrounding the contracting parties at the time the conveyance was made."

In the case of *Homan v. Stewart*, 103 Ala. 644, the lot was described as "my lot on the west side of Wilmer street, between Eleventh and Twelfth streets, and thirty-five ³⁵⁰ feet on Wilmer street, running back one hundred feet to an alley." It was held to be one of those uncertain descriptions which may be aided by parol: See, also, *Webb v. Elyton Land Co.*, 105 Ala. 471. Many others might be cited, but enough have been cited to the proposition, that although a deed may be void on its face for want of a definite description of the land, a court of chancery will reform the deed upon proper allegata of extrinsic facts, and their proof. Such averments are amendable, and, upon a motion to dismiss for a want of equity, these amendments must be considered as made. In the bill under consideration, after giving an accurate description of the land intended to be conveyed as averred, it alleges that, at the time of the execution of the deed of trust, the property was the property of the grantors, that they were in possession of it, and during the progress of

the transaction pointed out to complainant the lines and boundaries of the land, which was to be conveyed by the deed of trust. It is true that the bill does not aver that the grantors owned no other lands in the northwest quarter of said section 4, but, in view of the other facts averred, we do not regard the failure to make this additional averment fatal. Certainly, the bill is amendable in this respect, if the facts warrant the amendment. Lands are often described as being bounded by the lands of another person.

The ground of demurrer raising the question that the lands conveyed embraced the homestead of the grantors, and that there was no sufficient acknowledgment severally and respectively by the wives of the several grantors, is a mere speaking demurrer. Nothing of the kind appears in the face of the bill, and we will not consider the question at this time.

We are of opinion the court erred in its conclusion sustaining the demurrer, in dissolving the injunction and dismissing the bill. An order will be here entered reinstating the injunction, and the decree of the court is reversed and the cause remanded.

EQUITY—REFORMATION OF INSTRUMENTS.—Equity is the proper forum for the reformation of a deed: *Snyder v. Grandstaff*, 96 Va. 478, 70 Am. St. Rep. 863. A court of law has no jurisdiction to reform written instruments, even upon evidence that would justify a court of equity in so doing: See monographic note to *Williams v. Hamilton*, 65 Am. St. Rep. 481, on the reformation of contracts. Deeds may be reformed in equity for misdescription: Note to *Williams v. Hamilton*, 65 Am. St. Rep. 507.

COTTINGHAM v. HILL.

[119 ALABAMA, 868.]

EVIDENCE—DEEDS, AIDING BY PAROL.—A deed describing land conveyed as one acre, "on which the schoolhouse is to be built," and more particularly described as part of a specified forty-acre tract, is not void for want of a sufficient description. Parol evidence is admissible to identify the land conveyed.

PLEADING—DESCRIPTION IN EJECTMENT.—In ejectment, where parol evidence is necessary to identify the premises conveyed by deed, the complaint should not follow the description in the deed, but should aver the facts established by the extrinsic proof, so that the judgment, following the complaint, may be more certain and definite as to the land recovered.

Ejectment. The land was described in the complaint the same as in the plaintiffs' deed. The case was tried on an agreed

statement of facts. There was a judgment for the plaintiffs and the defendants appealed.

J. M. McMaster, for the appellants.

Hogue, Lavender & Fuller, for the appellees.

³⁵⁴ COLEMAN, J. The appellees sued in ejectment to recover an acre of land. Plaintiffs and defendants claim from a common source, the plaintiffs' deed having been executed first. There is no controversy as to the facts. The contention is whether plaintiffs' deed is void for want of a sufficient description of the land, and whether parol evidence was admissible to identify the land. The deed describes the land as follows: "One acre of land situated on the old Columbiana and Centreville road, on which the schoolhouse is to be built, and more particularly described as part of the northwest quarter of the northwest quarter of section 9, township 22, range 6 west, in Bibb county, Alabama." The parol proof offered in connection with this deed was, that prior to its execution, the grantors and grantees measured an acre of land, in shape square, with the road as a base, and cleared the same for the purpose of erecting a schoolhouse thereon; that the deed was executed describing it as above shown; that shortly after its execution, the schoolhouse was erected on the acre and has remained there ever since, and that the grantor owned no other acre in said forty acres upon which a schoolhouse was to be built. The question presented is, whether it is competent to show these facts by parol to identify the land in aid of the description in the deed. If the deed had described the land as the "schoolhouse lot," under several decisions of this court it would be upheld if, by parol proof, the acre could be identified as the schoolhouse lot, and upon the same principle we are of opinion that the words "upon which the schoolhouse is to be built," would let in parol proof to identify it. This court has gone as far as any other in admitting ³⁵⁵ parol evidence to sustain the validity of deeds assailed upon the ground of indefiniteness in the description of the land, but the rule which we have adopted promotes justice, and does not open the door to fraud and perjury. In all cases, the writing has been sufficient to show a bona fide sale and conveyance was intended by the parties, and, where this appears, no injustice results if, by parol evidence, the precise property intended to be conveyed can be clearly identified: *Chambers v. Ringstaff*, 69 Ala. 140; *Homan v. Stewart*, 103 Ala. 644; *Webb*

v. Elyton Land Co., 105 Ala. 471. No objection was raised to the complaint on account of the indefinite description of the land. In fact, the record shows that the parties agreed that if the deed by the plaintiffs should be upheld as valid, judgment should be rendered for the plaintiffs. Under this agreement of counsel the judgment of the circuit court must be affirmed.

It would have been better had the complaint described the acre of land more definitely, averring the facts established by extrinsic proof. The judgment of the court, following the complaint, would then have been certain and definite as to the acre of land recovered: *Clement v. Mathis*, 108 Ala. 211; *Clements v. Pearce*, 63 Ala. 284. We presume, however, from the agreement of the parties, that they desired only an adjudication of the question of the validity of the deed, and the admission of parol evidence to identify the land.

Affirmed.

EVIDENCE—AIDING DESCRIPTION IN DEED BY PAROL.—Evidence of extrinsic facts and circumstances is admissible to identify premises sold, or to apply the description thereto: *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841; *Lego v. Medley*, 79 Wis. 211, 24 Am. St. Rep. 706; monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 661, on subsequent parol agreement to vary a writing. If land conveyed is described as being "parts" of certain lots or tracts, but not stating what parts, the description may be aided by parol testimony: *Shore v. Miller*, 80 Ga. 93, 12 Am. St. Rep. 239. See *Tierney v. Brown*, 65 Miss. 563, 7 Am. St. Rep. 679.

FREDERICK v. WILCOX.

[119 ALABAMA, 355.]

MORTGAGES — OMISSION OF NAMES OF MORTGAGORS.—If a husband and wife sign a mortgage, the fact that their names do not appear in the body thereof does not vitiate the instrument, if enough appears from the whole thereof, outside of the signatures, to distinguish them as the mortgagors.

ACKNOWLEDGMENTS. — A LITERAL COMPLIANCE WITH THE STATUTORY FORMS of acknowledgment to conveyances is not exacted. A fair compliance is sufficient; and, to determine this, the certificate of acknowledgment may be read in connection with the deed. So, where there are two certificates to a mortgage, as in the case of a husband and wife, the certificates may be read in connection with the mortgage, and with each other, for the same purpose.

ACKNOWLEDGMENTS—HOMESTEAD.—A certificate of acknowledgment by a married woman uniting with her husband in a deed or mortgage in alienation of the homestead is to be liberally construed. A literal compliance with statutory forms is not exacted of such an instrument.

ACKNOWLEDGMENT BY WIFE—MAXIM AS TO CERTAINTY.—The omission of a husband's name in his wife's acknowledgment of a mortgage, executed by both, at the place therefor in the recital, and in the place of which name is a blank, does vitiate the acknowledgment, if his identity is shown by the two certificates and the mortgage. *Id certum est quod certum reddi potest.*

Ejectment by Louis Frederick against James Wilcox and Willis Owens. The defendants pleaded not guilty. The plaintiff introduced evidence tending to show title and possession prior to the bringing of his suit. A mortgage executed by the plaintiff and his wife, A. E. Frederick, to the defendant, Wilcox, was then offered in evidence by the defendants, to which the plaintiff objected, because of certain defects of form therein and in the acknowledgments thereto. The court overruled the objections. The plaintiff took a nonsuit, with a bill of exceptions, and appealed.

Cato D. Glover, for the appellant.

Logan & Vandegrift, for the appellees.

²⁵⁶ HARALSON, J. The mortgage in this case, admitted in evidence against plaintiff's objection, does not contain the names of the husband and wife as grantors in the body of the instrument, but it is signed by each of them at the conclusion under its signing clause. Instead of the names of the grantors being set out, the ²⁵⁷ mortgage, in recital of consideration, states "that the undersigned is justly indebted to James Wilcox in the sum of two hundred dollars, et cetera . . . and for the purpose and consideration of securing the same, the undersigned have this day bargained, sold, and conveyed, et cetera," and concludes, "Witness our hands and seals, et cetera." This was quite sufficient to distinguish the grantors and make it appear that each signed it, as much so as if their names, as they respectively appear at the place of signing, had been inserted in the body of the deed: *Sheldon v. Carter*, 90 Ala. 380; *Madden v. Floyd*, 69 Ala. 221.

2. The acknowledgment of the wife to the mortgage, to make it effectual to pass the homestead, was in conformity with the statute, except that the name of the husband is not therein stated at the place therefor in the form of the acknowledgment set out in the code. The certificate of the justice recites, "Came before me the within named A. E. Frederick, known to me to be the wife of the within named ———, who being examined separate and apart, et cetera." Following this separate

acknowledgment of the wife, at the same time and before the same justice, as appears, is the usual acknowledgment by the husband and wife, in all respects regular and full, except the certificate recites, "Simpson L. Frederick and his wife, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged, et cetera," without setting out the name of Mrs. Frederick, at it appears to the mortgage, the words "and his wife," being employed in the place of her name.

A literal compliance with these statutory forms of acknowledgment to conveyances is not exacted. It is sufficient if it appears that the statute has been fairly complied with; and, in determining this, the certificate of acknowledgment may be read in connection with the deed, and, as in this case, the two certificates may be read in connection with the mortgage and with each other: *Sharpe v. Orme*, 61 Ala. 263; *Carlisle v. Carlisle*, 78 Ala. 544. Moreover, a certificate of acknowledgment by a married woman, uniting with her husband in a deed or mortgage in alienation of the homestead, is liberally construed, and a literal compliance with statutory forms is not exacted. A substantial compliance is ³⁵⁸ sufficient: *Gates v. Hester*, 81 Ala. 357. The description of the grantors is sufficiently certain if their identity can be worked out through and by reference to the conveyances and certificates of acknowledgment thereto, the identity of the parties being clearly shown by reference the one to the other, and this on the maxim, *Id certum est quod certum reddi potest*: *Madden v. Floyd*, 69 Ala. 221.

This disposes of the assignments of error. Finding no error in the rulings of the court below, its judgment is affirmed.

ACKNOWLEDGMENTS—REFERENCE TO ATTACHED INSTRUMENT.—A substantial compliance with the statute is all that is required in a certificate of acknowledgment of a deed: *Note to Pickens v. Knisely*, 6 Am. St. Rep. 643; monographic note to *Livingston v. Kettelle*, 41 Am. Dec. 169, on acknowledgments of deeds, when fatally defective and when not. The instrument acknowledged may be resorted to in support of the acknowledgment: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108. It is the policy of the law to uphold certificates of acknowledgment, and, whenever it is found that the law has been substantially complied with, obvious clerical errors and all technical defects or omissions will be disregarded: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106.

ACKNOWLEDGMENTS — OMISSION OF MORTGAGOR'S NAME.—A notary's certificate of acknowledgment attached to a mortgage in due form of law, except that the name of the mortgagor is left blank, is not fatally defective, if such name can be supplied and ascertained by reference to the body of the mortgage: *Milner v. Nelson*, 86 Iowa, 452, 41 Am. St. Rep. 506. But see notes to *Tully*

v. Davis, 83 Am. Dec. 180; *Livingston v. Kettelle*, 41 Am. Dec. 176. It should appear that the officer taking the acknowledgment is satisfied of the identity of the party making it: *Note to Livingston v. Kettelle*, 41 Am. Dec. 175.

ACKNOWLEDGMENTS—MARRIED WOMEN.—In taking and certifying acknowledgments of deeds of married women, a literal compliance with the statute is not essential, but a substantial compliance is exacted: *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622; *Hughes v. Lane*, 11 Ill. 123, 50 Am. Dec. 436; *McIntire v. Ward*, 5 Binn. 296, 6 Am. Dec. 417.

DEED—OMISSION OF GRANTOR'S NAME.—Although a married woman signs and seals a deed, it is insufficient to convey her estate, unless she is named in the deed as a party to the conveyance: *Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221, and monographic note thereto, showing when a deed is binding upon a person not named as a party thereto.

EX PARTE HOWARD-HARRISON IRON COMPANY.

[119 ALABAMA, 484.]

JUDGMENT, PREMATURE ENTRY OF.—A judgment rendered before the appearance day specified in the summons or notice is irregular and erroneous, but not void.

JURISDICTION.—PROCESS WHICH IS AMENDABLE is not void, but will support a judgment. Hence, a judgment or order of a commissioners' court, raising an assessment of property of the "Howard-Harrison Pipe Works," instead of the "Howard-Harrison Iron Company," the true name of the defendant, is not void, though the summons or notice and return of service contained such misdescription or misnomer of the defendant, as such process is amendable.

JUDGMENT—MISNOMER IN ENTRY.—A judgment or order is not rendered void by its own misnomer of the defendant, where the record supplies data for its amendment, *nunc pro tunc*, so as to make it speak its rendition against the defendant by his true name.

STATUTES.—THE PRESUMPTION IS THAT A BILL SIGNED BY the presiding officers of both houses of a legislature, and approved by the governor, is the bill which the two houses concurred in passing, and the contrary must be made to appear affirmatively before a different conclusion can be justified or supported.

STATUTES—SILENCE OF LEGISLATIVE JOURNALS.—It will not be presumed, from the silence of legislative journals on a matter upon which it is proper for them to speak, that either house has disregarded a constitutional requirement in the passage of an act, except in those cases where the organic law expressly requires the journals to show the action taken, as where it requires the yeas and nays to be entered.

STATUTES.—TO PROVE THAT A BILL APPROVED BY THE GOVERNOR IS NOT THE ONE PASSED BY the legislature, or that it is materially variant therefrom, it must be affirmatively shown by the journals of the two houses that such is the case. No other evidence is admissible, for the journals can neither be contradicted nor amplified by loose memoranda made by the clerical officers of the houses, and to which the courts cannot look for any purpose.

STATUTES—CONSTRUCTION OF, IN PARI MATERIA.—A statute to provide for the more efficient assessment and collection of taxes should be construed in *pari materia* with an act to amend the revenue laws of the state, and this principle applies to laws concerning the equalization of assessments of property as well as to other laws.

TAXES—EQUALIZATION OF ASSESSMENT—COMMISSIONERS' COURT.—Under the statutes of Alabama, any citizen may enter such objection to any assessment as is requisite to put into operation the powers of the commissioners' court to increase the valuation of property assessed, or the court may, of its own motion, proceed to increase an assessment.

TAXES—EQUALIZATION OF ASSESSMENT—APPEAL.—Under the statutes of Alabama, proceedings by the county commissioners, upon assessments made by the tax commissioner, are to be had at the July term of the commissioners' court, and may be concluded at the time to which they were adjourned. Those laws also provide that an appeal may be taken by the tax commissioner in the name of the state, from the action of the commissioners' court.

Petition for mandamus and prohibition filed by the Howard-Harrison Iron Company, a corporation, showing that the petitioner had, by its agent, made an assessment of its property for the tax year, 1897, to the tax assessor, as follows: Personal property, sixty thousand four hundred and thirty dollars; real estate, thirteen thousand two hundred and sixty-five dollars; total, seventy-three thousand six hundred and ninety-five dollars; and that the assessor had entered such assessment on the tax-book and had returned the same with the tax list to the commissioners' court, as required by law. Subsequently, the tax commissioner, on July 16, 1898, filed with the commissioners' court an additional assessment, raising the valuation of petitioner's real estate. The commissioners' court also ordered or decreed that the valuation thereof be raised, as shown in the opinion. On August 18, 1897, the state took an appeal to the circuit court, and notice thereof was served on October 28, 1897. In the circuit court, the company, entering a special appearance, made a motion to strike the cause from the docket, for various reasons, but the motion was overruled. On the motion of the state, the court then issued a writ of certiorari to the commissioners' court directing them to send up a full and complete record of the cause in that court. The return was made, but when it was offered to the clerk of the circuit court to file, he refused to receive or file it. The company then moved the circuit court to compel the clerk to receive and file the return. This motion was overruled. The company then petitioned the supreme court for a writ of mandamus, praying that the judge and clerk of the circuit court be commanded and required to

file the return. It also petitioned for a writ of prohibition, restraining the judge of the circuit court from exercising, or attempting to exercise, any jurisdiction in the cause, and to compel him to grant the motion to dismiss and to strike the cause from the docket of the circuit court. The matters of contention sufficiently appear from the opinion.

James E. Webb and B. C. Jones, for the petitioner.

Ward & Houghton, against the petitioner.

⁴⁸⁸ McCLELLAN, J. There is conflict of authority on the point whether a judgment rendered before the appearance day specified in the summons or notice is irregular and erroneous merely, or void. The weight of adjudged cases and texts, however, support the view that such judgment is erroneous only and not void; and we so hold: 1 Freeman on Judgments, sec. 126, note 3; 12 Am. & Eng. Ency. of Law, 147; White v. Crow, 110 U. S. 183; In re Newman's Estate, 75 Cal. 213, 7 Am. St. Rep. 146; Stephenson v. ⁴⁸⁹ Newcomb, 5 Harr. 150; Solomon v. Newell, 67 Ga. 572; McAlpine v. Sweetser, 76 Ind. 78; Ballinger v. Tarbell, 16 Iowa, 491, 85 Am. Dec. 527; Mitchell v. Aten, 37 Kan. 33, 1 Am. St. Rep. 231; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104; Woodward v. Baker, 10 Or. 491; McNeill v. Hallmark, 28 Tex. 157. And hence our conclusion that the rendition of the judgment involved here on the thirteenth day of August, when the taxpayer had been summoned to appear on the fourteenth, marks it as an irregular and erroneous judgment; but it is not a void one.

There was much of misdescription of and mistake in the name of the corporation taxpayer in the proceedings in the commissioners' court. The tax commissioner set down the name correctly in the assessment he submitted to the court—the Howard-Harrison Iron Company—and so it appeared in the original assessment made by the tax assessor. In docketing the case, the statement is this: "The State of Alabama v. Howard-Harrison Iron Company Pipe Works." It is probable that the additional words "pipe works" were employed not as a part of the defendant's name, but as identifying it by this reference to the character of its business. In the summons to show cause against the proposed increased valuation the defendant is called the Howard-Harrison Pipe Works. The indorsements on the summons are as follows: "Original. Howard-Harrison Iron Works. Executed by mailing a copy of the within notice to

the Howard-Harrison Pipe Works," et cetera. It is not denied that this notice did in fact reach the defendant. And the order or judgment of the court entered on the docket under the caption of the case, as set out above, is as follows: "It is ordered by the court of county commissioners that the assessment of the property of the Howard-Harrison Pipe Works in this case, lands, buildings, machinery, et cetera, be raised from seventy-three thousand six hundred and ninety-five dollars to one hundred thousand dollars."

The summons or notice was amendable, and so also the return, in respect of the name of the defendant company: Georgia Pac. Ry. Co. v. Propst, 83 Ala. 518; Singer Mfg. Co. v. Greenleaf, 100 Ala. 272. And process which is amendable is not void, but will support a judgment: 1 Freeman on Judgments, sec. 126. Hence, we hold that the judgment or order of ~~the~~ the commissioners' court was not void for the misdescription or misnomer of the defendant in the notice and return of service.

Nor is the judgment or order rendered void by its own misnomer of the defendant. By reference to the assessment made and submitted by the tax commissioner and to the docket entries preceding the entry of the order, the judgment becomes in its present form essentially one against the Howard-Harrison Iron Company; and, even if that were not true, the record supplies abundant data for its amendment nunc pro tunc so as to make it speak its rendition against the defendant by accurate statement of the name of the corporation.

But it is insisted that the commissioners' court was wholly without jurisdiction of the subject matter of this proceeding, and that therefore, of course, the judgment is absolutely void. This conclusion is sought to be rested upon the following considerations: 1. That the revenue act of 1894-95 created county boards of equalization—bodies distinct from courts of county commissioners—and vested in said board exclusively all powers in respect of equalizing assessments of property for taxation; and 2. That though this act of 1894-95 was in terms repealed, so far as the constitution and powers of said boards of equalization are concerned, by the act of February 18, 1897, to amend the revenue laws of the state, and all powers of equalization were thereby in terms reconferred upon the commissioners' courts, yet said last-named act is unconstitutional and void for that the bill approved by the governor was not the bill which was passed by the general assembly, but materially variant therefrom, and that of consequence the act of 1894-95 is still of

force. The variances which petitioner supposes to exist between the bill as it passed the senate and house, and the enrolled bill which was signed by the president of the senate and the speaker of the house and approved by the governor, arose, it is insisted, upon the alleged facts that the senate amended section 15 of the bill as it passed the house by striking out the word "defendant" after the word "court" and inserting in lieu the words "either party"; that this amendment was never concurred in by the house and thus was never passed by the general assembly, but that it is embodied in the enrolled bill as approved by ⁴⁹¹ the governor; and that the following words: "If he has written the book in ink and has entered the names of all taxpayers in those cases where two or more parties pay on the same tract of land," were in section 11 of the bill as passed by the house, that no amendment striking them out was adopted by the senate, or if such amendment was adopted by the senate, it was not concurred in by the house, and that these words are not in the enrolled bill approved by the governor. Of course, the presumption is that the bill signed by the presiding officers of the two houses and approved by the governor is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be justified or supported. So here it must be made to affirmatively appear that amendments of the house bill in question were adopted by the senate and were not concurred in by the house. And this must be shown by the journals of the two houses. No other evidence is admissible. The journals can neither be contradicted or amplified by loose memoranda made by the clerical officers of the houses. To these the courts cannot look for any purpose. Nor will it be presumed from the silence of the journals on a matter upon which it is proper for them to speak that either house has disregarded a constitutional requirement in the passage of an act, except in those cases where the organic law expressly requires the journals to show the action taken, as where it requires the yeas and nays to be entered: *Walker v. Griffith*, 60 Ala. 361; 1 *Cooley's Constitutional Limitations*, 162; *People v. Starne*, 35 Ill. 141, 85 Am. Dec. 348 and notes; *Jones v. Jones*, 12 Pa. St. 350, 51 Am. Dec. 611, and notes; *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 Am. St. Rep. 220, and notes.

In respect of the act under consideration, the house journal shows that the bill originated in that body, was passed by it, sent to the senate where many amendments were adopted, and was

returned to the house, which refused to concur in the senate amendments, and asked a conference upon them, appointing its members of a committee to that end, that the senate granted the request for conference and appointed its members of the conference committee, that the conference committee met and agreed upon a report to the effect that the house should concur in senate amendments numbered ⁴⁹² 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 16½, 17, 18, 19, 20, 21, 23, 27, and 28, and that the senate should recede from its amendments numbered 11, 14, 24, 25, and 26, and that this conference report was adopted by the house. The senate journal shows that that body adopted quite a number of amendments to the house bill, and among others two amendments to section 15, that the house refused to concur in the senate amendments, that a conference committee was asked and appointed, that said committee reported that the house should adopt the amendments designated by the numbers as shown above in the report to the house and that the senate should recede from its amendments numbered 11, 14, 24, 25, and 26, and that this report was adopted by the senate. It is not shown by either of the journals what were the amendments adopted by the senate, nor what were their numbers respectively, nor what the amendments which the house concurred in, nor those from which the senate receded. It does appear from the senate journal, as we have seen, that two amendments to section 15 were adopted; and it also appears that amendments were adopted to several other sections by reference to the section numbers, and that "various other amendments were adopted," no reference to sections being made; but the journal utterly fails to show the nature of these amendments or their numbers. It may well be, for aught that the journals show or we can know, that the words which petitioner insists should have been in the enrolled bill when it was signed by the president of the senate and the speaker of the house, and approved by the governor were not in the bill as it passed the house originally, or, if they were, that they were stricken out by one of the "various amendments" adopted by the senate, and that the amendment to this effect was one of those which was concurred in by the house on the report of the conference committee. And so in respect of the words "either party," which now appear in section 15 of the bill as enrolled, signed, and approved. The journals do not show and we cannot know but that these words were in the bill when and as it passed the house, or, if it be conceded they were not, it does not appear

from the journals but that they were put into the bill by one of the two amendments made by the senate to that section, and that this amendment ⁴⁹³ was one of those which were concurred in by the house in its adoption of the report of the conference committee. It therefore does not affirmatively appear that the bill signed by the presiding officers of the houses of the general assembly, and approved by the governor is materially or at all variant from the bill that was passed by the general assembly, and the objection urged against the act of February 18, 1897, "To amend the revenue laws of the state of Alabama," in this connection is wholly unsupported by competent evidence.

It follows that the commissioners' court of Jefferson county had jurisdiction of the subject matter involved in this proceeding—the equalization of the assessment of the property of the Howard-Harrison Iron Company for taxation.

It is further insisted, however, that, conceding the general jurisdiction of the commissioners' court to increase assessment, it yet has no power to act upon increased assessments made and submitted by the tax commissioner, since the act we have been considering takes no account of nor makes any provision with reference to the latter officer, and that, of consequence, the judgment or order of the court increasing the assessment of the petitioner is void. This position is untenable. It is true the act makes no mention of the tax commissioner, his powers or duties, but under it any citizen may enter such objection to any assessment as is requisite to put into operation the powers of the court as conferred by section 15 of the act, and the court of its own motion may proceed to increase an assessment as in this case. Moreover, the act of February 3, 1897, "To provide for the more efficient assessment and collection of taxes in the state of Alabama," is to be taken in *pari materia* with the act of February 18, 1897, and section 11 of the former act expressly makes it the duty of the tax commissioner to make and submit to the commissioners' court additional assessments of property which he considers is undervalued in the original assessment.

But, aside from this, the act of February 3d, in and of itself, and without reference to the act of February 18th—except as reconfering powers of equalization upon commissioners' courts—confers complete authorization upon the tax commissioner and the commissioners' court to do and perform all that has been done in ⁴⁹⁴ this case, including the appeal taken by the commissioner in the name of the state to the circuit court, and this whether the provision of said act with reference to section 512 of the code of 1886 be sustained or not. Section 11 confers

the power and makes it the duty of the commissioner to submit additional assessments to the commissioners' court, and makes it the duty of the commissioners, if they are reasonably satisfied that undervaluation exists, to give notice "and try and dispose of such assessments as in other cases of undervaluations." This provision is complete in itself and capable of perfect execution without the succeeding provision, "and as provided for in section 512 of the code of 1886," and is to be upheld though the reference to section 512 of the code should be stricken down—as an attempt to revive a law by reference to its title only—which we do not decide. And while the act of February 3d does not in express terms provide for an appeal from the action of the commissioners' court, section 16 thereof does so provide by the clearest implication.

There is nothing in the contention of petitioner that the judgment of the commissioners' court was not rendered at a term at which the court is authorized to equalize tax assessments. If the acts of February 3d and February 18th are to be taken together, the proceedings authorized by section 11 of the former act are to be had at the July term of the court. These proceedings were begun at that term and concluded on a day in August to which they were adjourned as provided in the act. If the act of February 3d is to stand apart without its provision with reference to section 512 of the code of 1886, then no particular term of the court for action on the commissioners' assessments is prescribed. And if section 512 of the code is to be taken as a part of it, then the term of the court which acted on the matter here involved on August 13th, of necessity was the August term prescribed in that section.

We find nothing in the case made before us to authorize either of the writs prayed in the petition; and the application for mandamus and prohibition is denied.

JUDGMENT PREMATURELY ENTERED, as where the summons has been served but the time allowed by law to plead has not expired, is irregular merely, and not void: *Mitchell v. Aten*, 87 Kan. 83, 1 Am. St. Rep. 231.

JUDGMENT — MISNOMER — AMENDMENT — PROCESS.—All voidable process can be made perfect by proper amendments, but void process cannot be: *Durham v. Heaton*, 28 Ill. 264. 81 Am. Dec. 275. A mistake in the surname of a party, or any other part of his name, is fatal to the validity of legal process, where no power of amendment exists: *Crafts v. Sikes*, 4 Gray, 194, 64 Am. Dec. 62; but, notwithstanding the misnomer of a defendant, if the writ is served upon the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment by default, he is concluded thereby: *Note to Freeman v. Hawkins*, 19 Am. St. Rep. 772.

JUDGMENTS—ENTRY NUNC PRO TUNC.—The entry of a judgment nunc pro tunc can be made only upon evidence furnished by the papers and files in the cause or something of record, or in the minute-book or judge's docket, as a basis to amend by: *Missouri etc. Ry. Co. v. Holschlag*, 144 Mo. 253, 66 Am. St. Rep. 417. An amendment of a judgment can be allowed only for the purpose of making the record speak the truth, and not for the purpose of revising or changing the judgment: *Scamman v. Bonslett*, 118 Cal. 293, 62 Am. St. Rep. 226. That a judgment against a corporation cannot be corrected nunc pro tunc by striking out the name under which the defendant was sued and served with process, and substituting another name, see monographic note to *Ninde v. Clark*, 4 Am. St. Rep. 831, on the nunc pro tunc entry of judgments.

STATUTES—PROOF OF ENACTMENT—PRESUMPTION.—The journals of the legislature need not affirm the existence of every act required by the constitution in the enactment of a law. It will be presumed, in the absence of a showing to the contrary, where the journals are silent, that each of such acts was done. An enrolled statute, signed by the presiding officers of the two houses of the legislature and the governor, is the sole expositor of its contents, and is conclusive evidence that the act so signed contains the provisions of the bill as passed by the two houses. The journals of those houses cannot be resorted to for the purpose of showing that such act does not contain amendments to the bill which were adopted by the two branches of the legislature: See monographic note to *Carr v. Coka*, 47 Am. St. Rep. 818, 821, on proof of the enactment of statutes.

SOUTHERN RAILWAY COMPANY v. HARRISON.

[119 ALABAMA, 539.]

CONTRACTS—LAW OF PLACE.—As a general rule, a contract is governed, as to its nature, obligation, validity, and interpretation, by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case the law of place of performance, or the law which both parties had in view, must govern.

CONFLICT OF LAWS—CARRIERS FROM ONE STATE TO ANOTHER.—A contract for the transportation of goods by a common carrier from one state or country to another is, as a general rule, governed by the law of the place where it is made and where the performance begins, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other state or country.

CONFLICT OF LAWS—NATIONAL LEGISLATURE, WHEN PREVAILS—CARRIERS.—In cases where the subject matter of a contract is exclusively one of national cognizance, and Congress has enacted a law for its complete regulation, the parties must be presumed to have contracted with reference to the act of Congress and its effect on the subject matter, and not with reference to the law of the state where the contract was made, for they could not, by agreement or otherwise, make any other law the applicatory law in the determination of the nature, validity, or interpretation of the contract.

STATUTES—CONSTRUCTION OF ACTS OF CONGRESS—COMITY.—No principle of comity requires the courts of one state

to place the same construction upon an act of Congress, with respect to its effect upon a contract, the subject matter of which is within the exclusive cognizance of federal law, as has been given to it by the decisions of the supreme court of another state, in which the contract was made.

STATUTES—CONSTRUCTION OF ACTS OF CONGRESS.—If an act of Congress, which governs a contract, has been construed by the supreme court of the United States, the decision of that court is supreme, and the state courts are bound by it; but, until it has received a construction from the highest national tribunal, the various state courts are free to exercise their own judgments in determining its effect on the contract, and the rights of the parties thereto growing out of it.

CARRIERS—DIFFERENCE BETWEEN RATES SPECIFIED IN BILL OF LADING AND THOSE ESTABLISHED BY SCHEDULE.—Under the act of Congress, known as the "interstate commerce law," one who has obtained from a common carrier the transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates, filed with and approved by the interstate-commerce commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment or tender of payment, of such amount.

Action for damages for the wrongful detention of goods by a common carrier, brought in the city court of Birmingham. The defendant filed a plea of the general issue, and special pleas, setting up facts which sufficiently appear from the opinion. The court sustained demurrers by the plaintiff going to the sufficiency and substance of the special pleas; and the defendant offered evidence tending to establish the averments of such pleas. The court sustained objections to the offer, and the defendant appealed.

Smith & Weatherly, for the appellant.

Gregg & Thornton, for the appellee.

⁵⁴¹ BRICKELL, C. J. On February 20, 1896, appellant, a common carrier engaged in interstate commerce, ⁵⁴² received from appellee at Atlanta, Georgia, for transportation over its road to Birmingham, Alabama, two carriages of the alleged value of twelve hundred dollars, and delivered to appellee a bill of lading in which the rate specified was ninety-six cents per hundred pounds, and the weight two thousand five hundred pounds, making the aggregate charge twenty-four

dollars. Upon the arrival of the carriages in Birmingham a few days later, appellee tendered that amount in payment of the charges, but the appellant refused to accept the tender, or to make delivery of the carriages. The ground of this refusal was that the rate specified in the bill of lading was less than that fixed by the schedule rates, fares, and charges established and published in accordance with the act of Congress known as the "interstate commerce law," and that the agent of appellant at Atlanta had, inadvertently and by mistake, wrongfully and in violation of that law, agreed upon and specified in the bill of lading a rate of ninety-six cents per hundred pounds, instead of one dollar and twenty-eight cents, as said schedule required him to charge. Appellee refused to pay the extra charge, amounting to eight dollars, and appellant retained possession of the carriages until August 11, 1896, when it delivered them to appellee upon the payment of twenty-four dollars, the stipulated charge. Appellee instituted this suit to recover the damages resulting to her from the loss of the use and hire of the carriages, the actual injury thereto, and their deterioration in value during the period of detention.

The subject matter of the contract, the transportation of goods from one state to another, was an act of interstate commerce, and as such a subject of federal cognizance and governed by the act of Congress entitled, "An act to amend an act entitled an act to regulate commerce," approved February 4, 1887. By the provisions of section 6 of this act, every common carrier subject to the same is required to print and publicly post at each station its route, for the inspection and information of the public, the schedule of fares, rates, and charges for the carriage of passengers and property thereon. It is further provided that "when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, or collect, or receive from any person or persons a greater or less compensation for the transportation ⁵⁴³ of passengers or property, or for any service in connection therewith than is specified in such published schedule of rates, fares, and charges, as may at the time be in force." It is further unlawful for any person, in any manner, knowingly, to obtain transportation at less than the published schedule of rates, and any violation of the statute, whether by the consignors or consignees, or by the carrier, is made a highly penal offense. In *Mobile etc. R. R. Co. v. Dismukes*, 94 Ala.

131, decided in 1891, we had occasion to consider a contract for the transportation of goods into this state from another state at less than the published schedule rates, and to construe the act of Congress with respect to its effect on such a contract and on the rights of the parties thereto. In that case, as in this, the plaintiff sought to recover damages for the refusal of the carrier to deliver the goods after tender of the amount of the charges specified in the bill of lading. We then held that, although the contract was illegal and void as to the carrier, because made in violation of the interstate commerce law, and could not be made the basis of any action on the part of the carrier, yet, inasmuch as the consignor had not knowingly obtained the transportation at less than the schedule rates, his act was not tainted with the criminality of the carrier, and, not being in *pari delicto* with the carrier, he was entitled to invoke the principle of law which authorizes the enforcement of such a contract in behalf of the innocent party; and he could, therefore, upon the payment or tender of the charges named in the bill of lading, maintain the action and recover damages for the failure of the carrier to deliver the goods to him. It is now insisted by counsel for appellant that the present case differed from the case cited in two particulars: 1. Because the schedule rate, which appellant claims to be entitled to collect, was not unreasonable or excessive, or disproportionate to the value of the goods, as in the *Dismukes* case, in which the value of the goods was forty dollars, the charges specified in the bill of lading five dollars and forty-four cents, and the schedule charges twenty-nine dollars and thirty cents; and 2. Because the contract was made in the state of Georgia, and was therefore to be governed, as to its nature, obligation, and interpretation, by the law of that state, and not by the law of Alabama; and by the law of Georgia, a common carrier, engaged in interstate ⁵⁴⁴ traffic, who undertakes to transport goods from one state to another at less than the published schedule rates established in accordance with the act of Congress, is not precluded from recovering the full schedule rate, because, by a mistake, a less rate was agreed upon and specified in the bill of lading, and may retain possession of the goods until the full schedule rate is paid. We are of the opinion that our ruling in *Mobile etc. R. R. Co. v. Dismukes*, 94 Ala. 131, can no longer be followed, either in this or in any similar case involving the right of a consignor or consignee of goods, transported by a common carrier from one state to another, to recover damages for the refusal of the car-

rier, after the arrival of the goods at their destination, to deliver them upon the payment or tender of the charges agreed upon and named in the bill of lading, when such charges are less than the published schedule charges, in force at the time the contract was made, established in accordance with the provisions of the interstate commerce law. But neither of the particulars in which it is contended this case differs from that will justify any modification of, or departure from, that ruling. The principle on which that case was decided is not affected by the degree of disparity between the schedule rate and the stipulated rate. What was there said in this respect was by way of illustration only, to show the wrong and injustice of permitting a carrier, who may have induced a shipper, by promises of low rates, to ship his goods over its line, to recover a greater, and perhaps extortionate, rate. Nor can the ruling in that case be affected by the fact that by the law of Georgia, in which state the contract of carriage was made, the carrier may recover the schedule rate, notwithstanding a lower rate may have been agreed upon. The general rule of law, it is true, is, that a contract is governed, as to its nature, obligation, validity, and interpretation, by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case the law of place of performance, or the law which both parties had in view must govern: *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45; *Cubbedge etc. Co. v. Napier*, 62 Ala. 518; *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275. And the weight of authority is, that this rule requires a contract for the transportation of goods by a common carrier from one state or ⁵⁴⁵ country to another to be governed by the law of the place where it is made and where the performance begins, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other state or county: *Wharton on Conflict of Laws*, sec. 471; *Hutchinson on Carriers*, secs. 140-144; *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 412; *Hazel v. Chicago etc. Ry. Co.*, 82 Iowa, 477; *Pennsylvania R. R. Co. v. Fairchild*, 69 Ill. 260; *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 568, 49 Am. St. Rep. 898; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 25 Am. St. Rep. 660; *Potter v. The Majestic*, 60 Fed. Rep. 625. But this rule can have no application where the subject matter of the contract is one of national cognizance and Congress has assumed exclusive cognizance of it by enacting a law for its

complete regulation. In such case, the parties must be presumed to contract with reference to the act of Congress and its effect on the subject matter, and not with reference to the law of the state where the contract was made, and they cannot, by agreement or otherwise, make any other law the applicatory law in the determination of the nature, validity, or interpretation of the contract. No principle of comity requires the courts of one state to place the same construction upon the act of Congress, with respect to its effect on such a contract, given to it by the decisions of the supreme court of another state, in which the contract was made. Unless the national law has been construed by the supreme court of the United States, the courts of the various states will follow their own judgment in determining its effect on the contract, and the rights of the parties thereto growing out of it; but if it has received a construction from the highest national tribunal, its decision is supreme, and by it the state courts are bound: *Tubbs v. Wilhoit*, 73 Cal. 61; *State v. Andriano*, 92 Mo. 70; *Lyman v. Central Vt. Ry. Co.*, 59 Vt. 167; *Bressler v. Wayne Co.*, 25 Neb. 468. The interstate commerce law has been construed by the supreme court of the United States, and its effect upon a contract by a common carrier to transport goods from one state to another at less than the published schedule rates, and upon the rights of the parties to such a contract, ⁵⁴⁶ has been declared. In *Gulf etc. Ry. Co. v. Hefley*, 158 U. S. 98, the plaintiff sued to recover damages for the refusal by the carrier to deliver goods consigned to him, after tender of payment of the stipulated charges named in the bill of lading. The goods, a lot of furniture, had been received by the carrier at St. Louis, Missouri, for transportation to Cameron, Texas, at a stipulated rate, specified in the bill of lading, of sixty-nine cents per hundred pounds, the charges amounting to eighty-two dollars and eighty cents, whereas the published schedule rate in force at the time was eighty-four cents, and the charges should have been one hundred dollars and eighty cents; and the plaintiff, as in this case, was ignorant of the fact that the rate obtained was less than the schedule rate. It was held, in an opinion by Brewer, J., that the plaintiff was not entitled to recover. It is true that the only question discussed in the opinion was whether or not the interstate act superseded the Texas statute, which prohibited a common carrier from charging or collecting from the owner or consignee of freight a greater sum than that specified in the bill of lading, and this question was decided in the affirmative, as in

the Dismukes case. But this was not the only effect of the decision, and it is by its effect on the rights of the parties to such a contract, by whatever process of reasoning the decision may be reached, that the state courts are bound. The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, less than the published schedule rates, filed with and approved by the interstate commerce commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such ⁵⁴⁷ is now the supreme law, and by it this and the courts of all other states are bound, and for this reason our ruling in *Mobile etc. R. R. Co. v. Dismukes*, 94 Ala. 131, can no longer be followed.

It results that the inquiry as to the law of the state of Georgia was entirely immaterial and irrelevant, and the court below did not err in sustaining the objection to appellant's offer of evidence on this point. But proof of compliance with the requirements of the interstate commerce law, of the amount of the charges fixed by the published schedule of rates and charges, and of the other facts offered in evidence by appellant, was relevant, and the demurrers to the pleas setting up these facts should have been overruled, and under such pleas evidence of these facts should have been admitted. Upon uncontradicted proof of these facts, if they had been in evidence, in connection with the other evidence in the case, the defendant would have been entitled to the general charge in its favor. The judgment of the city court must be reversed, and the cause remanded for further proceedings in conformity to this opinion.

CONTRACTS—LAW OF PLACE—CARRIERS—INTERSTATE COMMERCE.—As a general rule, the *lex loci* governs the validity, interpretation, and construction of contracts: *Ruhe v. Buck*, 124 Mo. 178, 46 Am. St. Rep. 439, and extended note thereto also showing that such matters are determined by the law of the place where the contract is made: *Falls v. United States etc. Bldg. Co.*, 97 Ala. 417,

38 Am. St. Rep. 194; Forepaugh v. Delaware etc. R. R. Co., 128 Pa. St. 217, 15 Am. St. Rep. 672. Compare monographic note to McGarry v. Nicklin, 55 Am. St. Rep. 44-55, on the place of the contract. A contract made in one state, between a railroad company and a shipper, for the transportation of freight from a point in that state to a point in another state, and limiting the liability of the carrier, must be interpreted according to the law of the state where it was made: Note to Davis v. Chicago etc. Ry. Co., 57 Am. St. Rep. 944. The validity, obligation, and effect, however, of a contract made in one state, to be performed in another, is governed by the laws of the latter: Pittsburgh etc. Ry. Co. v. Sheppard, 56 Ohio St. 68, 60 Am. St. Rep. 732. But, from the moment that an article of commerce commences to move from one state to another, it becomes the subject of interstate commerce, and as such is subject only to national legislation: Notes to Norfolk etc. Ry. Co. v. Commonwealth, 29 Am. St. Rep. 715; Bagg v. Wilmington etc. R. R. Co., 26 Am. St. Rep. 579.

CARRIERS — INTERSTATE COMMERCE — ACTIONS FOR DAMAGES—JURISDICTION.—One who claims damages for a violation of the interstate commerce act cannot maintain his action in a state court, but must bring it either before the interstate commerce commission or a federal court: Note to Houston etc. Nav. Co. v. Insurance Co., 59 Am. St. Rep. 25.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY v. BURGESS.

[119 ALABAMA, 555.]

EVIDENCE—OPINIONS.—A witness who is not shown to know anything about the time or distance within which a railroad train could be stopped, under any circumstances or conditions, is not competent, in an action against a railway company for personal injuries caused by its train, to give his opinion as to the distance within which the train could have been stopped at the time of the injuries.

TRIAL—EXCLUSION OF TESTIMONY IMPROPERLY RECEIVED.—A court is not bound to persist in error. Hence, it may cure error in receiving testimony by afterward excluding it, and its right to do this is not defeated by the fact that the party injured by the admission of the testimony has been forced, because of its presence before the jury at one time, to introduce evidence which puts him at a disadvantage after such exclusion.

RAILROADS—WANTON INJURY TO CHILD ON TRACK.—If a child between seven and eight years of age is upon a railway track, and a train is approaching at the rate of thirty-five or forty miles an hour, but the engineer, when four hundred yards away, discovers the child in its perilous position, and could, with due care and diligence—that is, by use of the means at his command—stop the train within two hundred yards, and thus avoid injury to the child, but, knowing this, he fails to so stop his train, the railway company is answerable if the child is struck by the train and injured. If the engineer, having in mind what to do to save the child, and having in hand the means to that end, fails to use those means, this cannot be less than a conscious failure of obvious duty in view of probable disastrous consequences, and such failure, with the probable conse-

quences standing out before him, is, at the least, wanton and reckless disregard of the child's safety, for which the railway company would be answerable, though the child's own negligence may have contributed to its injury.

RAILROADS—WILLFUL INJURY TO CHILD ON TRACK.

If a railway company runs its train upon and against a child on its track, an intent to injure, on the part of the company's employes, is not essential to liability, notwithstanding contributory negligence. It is enough if they exhibit such wantonness and recklessness concerning probable consequences as implies a willingness to inflict injury, or an indifference as to whether injury is inflicted, though they may not have any such affirmative purpose.

NEGLIGENCE, WANTON, WHAT IS.—In an action to recover damages of a railway company for running its train upon and against a child on its track it is proper to instruct the jury that: "What is meant, in this case, by wanton negligence is the conscious failure on the part of defendant to use reasonable care, under the circumstances, to avoid the injury after discovering the danger of the child, if they find there was such failure, and injury resulted therefrom."

RAILROADS—WANTON INJURY—DEGREE OF PROOF REQUIRED.—In an action to recover damages of a railway company for running its train upon and against a child on its track, it does not devolve upon the plaintiff to "satisfy" the jury, absolutely, of wantonness, willfulness, or intentional wrong on the part of the defendant's employes, but only to "reasonably" satisfy them.

DAMAGES—MEASURE OF, IN ACTIONS FOR PERSONAL INJURIES.—In cases of actions for personal injuries, where the recovery must be rested upon the wanton or willful misconduct of the defendant's employes, and the damages may be punitive as well as compensatory in character, and where compensatory damages are claimed for physical and mental pain and suffering, the plaintiff, if he is entitled to recover at all, may be awarded such damages as the jury see proper to assess, not in excess of the amount claimed in the complaint.

DAMAGES—AWARD OF—EXPLANATORY INSTRUCTIONS.—In case it be supposed or feared that the jury does not understand a charge respecting an award of damages, or may be misled by it to an unbridled and capricious assessment, an explanatory instruction should be requested.

NEW TRIAL—DAMAGES—EXCESSIVE—WHAT IS.—In an action against a railway company for running its train upon and against a child between seven and eight years of age, and injuring it by fracturing the outer plate of the skull, inflicting a temporary loss of speech, and rendering it unconscious for two days, a verdict for five thousand dollars damages for wanton injury of the child is excessive, and ground for a new trial, where no permanent injury was inflicted, except a slight depression in the outer plate of the skull.

Action by the appellee, T. J. Burgess, suing by his next friend, against the appellant railroad company, to recover damages for personal injuries, which were alleged to have been caused "willfully, wantonly, and intentionally," through the agents or servants of the defendant. The plaintiff was struck by an engine, and rendered unconscious for two days. The

outer plate of his skull was fractured and he suffered a temporary loss of speech, but further than a slight depression in the outer plate of the skull there was no evidence that any permanent injury had been inflicted. During the examination, L. F. Burgess, the father of the plaintiff, testified that the train could have been stopped in about two hundred yards. The defendant requested a charge that the jury should find a verdict for the defendant, unless the evidence "satisfied" them that the engineer willfully and wantonly or intentionally injured the plaintiff. A verdict for seven thousand dollars was returned for the plaintiff. The court considered this excessive and required the plaintiff to remit two thousand dollars as a condition to overruling a motion to set aside the verdict. The plaintiff, having remitted the two thousand dollars, the motion to set aside was overruled. The defendant appealed.

A. E. Goodhue, for the appellant.

Dortch & Martin, for the appellee.

⁵⁶² McCLELLAN, J. The witness, L. F. Burgess, was not shown to know anything about the time or distance within which a train could be stopped under any circumstances or conditions. He should not, therefore, have been allowed to give his opinion that defendant's train could have been stopped on the occasion of the injury within a distance of two hundred yards. The error of receiving this testimony was, however, cured by its subsequent exclusion. And the court's right and power to thus correct itself cannot be defeated of exercise by the fact that the defendant was forced, in view of this testimony being improperly before the jury at one time, to introduce evidence which put it at a disadvantage after this was withdrawn. The defendant, it may be, was entitled to protection against such a result through a request to be allowed to withdraw the evidence it had been thus forced to offer, but the court was not bound to persist in the error it had committed.

The case made by one tendency of the evidence is this: ⁵⁶³ A child between seven and eight years of age was upon defendant's track. A train was approaching at the speed of thirty-five or forty miles an hour. When four hundred yards from the child the engineer discovered it in its perilous condition. With due care and diligence, i. e., by the use of the means at his command, he could have stopped the train within two hundred yards and thus have avoided the injury to the child. Knowing this, he nevertheless failed to so stop his train. If he consciously,

failed to exercise the care it was his duty to exercise under the circumstances—if, having in mind what to do in order to save the child and having in hand the means to that end, he failed to use those means—this cannot be less than a conscious failure of obvious duty in view of probable disastrous consequences; and such failure of such duty, with the probable consequences standing out before him, is at the least wanton and reckless disregard of the child's safety, for which the defendant would be liable, though the child's own negligence may have contributed to the result. We understand that part of the court's general charge to which an exception was reserved and charges 2, 4, and 5 given at plaintiff's request to so state the law; and the court did not err in any of these instructions. Of course, an intent to injure on the part of defendant's employes is not essential to liability, notwithstanding contributory negligence. It is enough if they exhibit such wantonness and recklessness as to probable consequences as implies a willingness to inflict injury, or an indifference as to whether injury is inflicted, though they may not have any such affirmative purpose. Charge 2 correctly asserts this last proposition, when referred to the evidence, in that it affirms that an intention on the part of the engineer to injure the plaintiffs was not essential to recovery.

In the case of Alabama etc. R. R. Co. v. Burgess, 116 Ala. 509, a charge, there numbered 7, much like charge No. 4 given for the plaintiff in this case, was criticised and condemned. It was as follows: "That all that is meant in this case by 'wanton, willful, or intentional negligence' is the conscious failure, on the part of the defendant, to use reasonable care, under the circumstances, to avoid the injury after discovering the danger of the child, if the jury find from the evidence there was such failure and the injury resulted therefrom." 504 The ground of the criticism was that the charge did not hypothesize a consciousness on the part of the defendant that the injury would probably result from the conscious failure to use the means at hand to avoid it. We now think that this criticism was ill-founded. The charge does hypothesize that the danger in which the child was had been discovered by the defendant's employes and was known to them; it does hypothesize that there were means at hand known to the employes to avoid the injury which was imminent, and it does hypothesize that they consciously failed to use these means, and that in consequence thereof the injury was inflicted. It was not a mere negligent, inadvertent, unintentional failure to use the means at hand, of which willful-

ness and wantonness cannot be affirmed, even though they knew the danger; but it was a conscious omission to use a known means to a known end, after having discovered, and, therefore, at the time knowing, the peril to be averted by such use. We now think it cannot be fairly said but that on the facts hypothesized in that charge the defendant's employés were conscious that their omission to act would likely result in the injury complained of. Coleman, J., adheres to the views on this point he expressed in the case just cited, that said charge, on account of its phraseology, was misleading.

It is sufficient to say in condemnation of charge 7, refused to defendant, that it exacts too high a degree of proof. It was not on the plaintiff to satisfy the jury absolutely of wantonness, willfulness, or intentional wrong on the part of defendant's employés, but only to reasonably satisfy them: *Torrey v. Burney*, 113 Ala. 496.

Where, as in this case, the recovery must be rested upon the wanton or willful misconduct of the defendant's employés, and the damages may be punitive as well as compensatory in character, and where, as here, compensatory damages are claimed for physical and mental pain and suffering, the court does not err in instructing the jury that, if the plaintiff is entitled to recover at all, they may award him such damages as they see proper to assess, not in excess of the amount claimed in the complaint. Such a charge in truth and in fact refers the assessment to the sound discretion of the jury. ⁵⁰⁵ If it be supposed or feared that the jury might not so understand it, or might by it be misled to an unbridled and capricious assessment, an explanatory instruction should be requested: *Alabama etc. Ry. Co. v. Bailey*, 112 Ala. 167; *Montgomery etc. Ry. Co. v. Mallette*, 92 Ala. 209. And when to the consideration that physical and mental pain and suffering were to be compensated for in this case, and that accurate measurement of such compensation is not practicable, is added the consideration that exemplary and punitive damages were within the sound discretion of the jury in this case, we do not see our way to the conclusion that the assessment of seven thousand dollars was excessive. Whether, conceding that assessment to have been excessive, and five thousand dollars not to be excessive, the trial court should have set the verdict aside instead of requiring plaintiff to remit two thousand as a condition to overruling the motion to vacate the verdict, we need not decide. It is, therefore, the writer's opinion that the assessment of seven thou-

sand dollars was not excessive, and, of course, that the reduced verdict was not excessive, and should be allowed to stand. A majority of the court, however, holds that the reduced verdict was excessive, and that the trial court should have granted a new trial on that ground. For this error the judgment must be reversed. The cause is remanded.

WITNESSES—OPINIONS.—To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry: *Note to Chicago v. Seben*, 56 Am. St. Rep. 252.

WANTON AND WILLFUL INJURIES—LIABILITY.—To constitute willful injury there must be design, purpose, and intent to do wrong and inflict injury: *Note to Isham v. Dow*, 67 Am. St. Rep. 695. A plaintiff may recover, although his own negligence contributed to injury, if the wrong on the part of the defendant is so wanton and gross as to imply a willingness to inflict the injury; and this is always to be attributed to the defendant, if he might have avoided injuring the plaintiff, notwithstanding the latter's negligence: *Indianapolis etc. R. R. Co. v. McClure*, 26 Ind. 370, 89 Am. Dec. 467. A plea of contributory negligence is no answer to a complaint charging willful and wanton negligence: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21. That "wanton" does not mean "willful," see *Lafayette etc. R. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318.

WANTON NEGLIGENCE—WHAT IS.—To constitute wanton negligence, the party doing the act, or failing to act, must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surroundings, circumstances, and existing conditions, that his conduct will naturally or probably result in injury: *Note to Isham v. Dow*, 67 Am. St. Rep. 695.

RAILROADS—INJURY TO CHILD ON TRACK—CONTRIBUTORY NEGLIGENCE.—A railroad company must exercise the utmost care and diligence to avoid running over a person on its track: *East Tennessee etc. R. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149. It is the duty of a railroad engineer to exercise ordinary care to avoid striking even a trespasser upon the track: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *note to Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54. After a railroad engineer discovers children on the track he is bound to assume that they will remain, and must then exercise the highest degree of care to avoid injuring them. It is also his duty, with respect to children of tender years and immature judgment, to keep a reasonable lookout for the purpose of discovering whether they are on the track: *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, and *note*. A failure in such duty will render the railroad company answerable for resulting injuries: *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; *Kansas etc. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211.

RAILROADS—PERSONS ON TRACK—PRESUMPTION—WANTON OR WILLFUL NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—Ordinarily, a railroad engineer has a right to presume that one on the railroad track will get off before the engine reaches him, and it is not considered negligent to act upon that presumption: *Note to Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54. But it is negligence not to slacken the speed of a train so that it can be stopped, if necessary, where the engineer has seen an object on the

track a long way off, and cannot tell what it is; and particularly so where the object is recognizable as a child by any one using ordinary care and precaution to discover it: See monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 428, on negligence in dealing with children. Wanton and willful negligence on the part of a defendant can never be excused by contributory negligence on the part of a plaintiff: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21; and this rule applies in cases of personal injuries to children: *Pratt etc. Iron Co. v. Brawley*, 83 Ala. 371, 3 Am. St. Rep. 751; *Kansas etc. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 54 Am. St. Rep. 211.

DAMAGES—PERSONAL INJURIES.—The jury, in an action for personal injuries, should give the plaintiff such a sum as will compensate him for the injuries received, taking into consideration all the facts proved in the case: *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301. If a personal injury is caused by gross carelessness, or recklessness, or willfulness, the jury may assess exemplary damages in a proper case: *Garrick v. Florida etc. R. R. Co.*, 53 S. C. 448, 69 Am. St. Rep. 874; *Mack v. South Bend R. R. Co.*, 52 S. C. 323, 68 Am. St. Rep. 913. As to what may be considered, generally, in estimating damages for personal injuries, see note to *Goodhart v. Pennsylvania R. R. Co.*, 55 Am. St. Rep. 711.

NEW TRIAL—EXCESSIVE VERDICT.—A verdict not influenced by improper motives, passion, or prejudice, and awarding such damages as are only a just compensation for the injuries sustained, cannot be disturbed on appeal, on the ground that it is excessive: *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847; and, in an action to recover for personal injuries suffered by the plaintiff, a verdict in his favor will not be set aside as excessive, unless the sum awarded is so great as to furnish ground for the belief that the jury were actuated by partiality or prejudice: *Richmond etc. Electric Co. v. Garthright*, 92 Va. 627, 53 Am. St. Rep. 839. There is no error in overruling a motion for a new trial where the amount of the verdict, as voluntarily reduced by the plaintiff, is authorized by the evidence: *Brunswick v. Tucker*, 103 Ga. 233, 68 Am. St. Rep. 92.

SOUTHERN RAILWAY COMPANY v. PRATHER.

[119 ALABAMA, 568.]

STATUTES, ACTION FOR VIOLATING.—A violation of a statute or ordinance made for the benefit or protection of certain persons or classes does not give a right of action, under all circumstances, to persons or classes not within its purposes.

RAILROADS — VIOLATION OF ORDINANCES—LIABILITY.—A railway company is answerable for all damages resulting proximately from its violation of valid city ordinances, made for the protection of the public, but it is not answerable for damages which do not result proximately from such cause.

RAILROADS—INJURY CAUSED BY OBSTRUCTION OF STREET CROSSING.—It is not negligence per se to attempt to drive over a public street crossing, obstructed by stationary cars of a railroad company. Hence, a complaint to recover damages for personal injuries sustained, and for damages done to personal property, in

making such an attempt, within the limits of a city, states a good cause of action, but subject to the defense of contributory negligence, where it is alleged that the defendant railway company had a double track; that the plaintiff found the crossing obstructed by cars, contrary to the city ordinances; that on one side its cars extended from one direction into the crossing; that on the other side its cars extended into the crossing from an opposite direction; that there was sufficient space left of the public crossing over which the plaintiff could pass, without leaving the highway, by driving in front of the cars on one side, and, by making a short turn between the cars, going in front of the cars on the other track; but that, in making such short turn, the wheels on one side of his buggy struck against the iron railway track, throwing the plaintiff out of his buggy, and thus causing injury to person and property.

RAILROADS—INJURY CAUSED BY OBSTRUCTION OF STREET CROSSING—STATIONARY CARS—NEGLIGENCE—PLEADING.—If a railway company, contrary to a city ordinance, obstructs a public street crossing by leaving stationary cars upon it, and one who has been injured in person and property while attempting to go over such crossing brings an action to recover damages from the company for such injuries, an averment that they were caused by the "wantonness, recklessness, or willfulness of defendant's agents or servants in failing or refusing to remove" the cars from the crossing, charges no more than simple negligence, where it is not fairly inferable from the facts averred that the defendant placed the cars on the crossing for the purpose of causing injury, or failed to remove them from any reckless indifference to consequences, being conscious that such failure would probably result in injury.

MUNICIPAL CORPORATION—ORDINANCES, NECESSITY FOR PLEADING.—If a plaintiff, in an action for personal injuries and for injury to personal property, caused by obstructions, in the shape of stationary cars left on a public crossing within the limits of a city by a railway company, bases his right of action on the negligence of the defendant company in violating a city ordinance, he must set out so much of the ordinance as is relied on to support the cause of action; otherwise, the complaint is insufficient.

RAILROADS—INSUFFICIENT PLEADING OF ORDINANCE AS TO CARS LEFT IN STREET.—In an action to recover damages for personal injuries received while crossing a street, obstructed by stationary railway cars, an allegation that a city ordinance, at the time, prohibited railroad companies from allowing cars to stand in streets longer than five minutes at a time is not a sufficient pleading of the ordinance.

RAILROADS—INSUFFICIENT PLEADING OF ORDINANCE AS TO DELAY OF FIREMEN.—If a person, in going to a fire, is injured while crossing a street which is obstructed by stationary railway cars, and brings an action against the railway company, basing it upon the provision of a city ordinance which declares that "no person shall obstruct any street in any manner calculated to delay any company in carrying their apparatus to or from any fire," the complaint is insufficient, where there is no allegation that any company was obstructed in carrying its apparatus to or from a fire, and it does not show that the alleged injury resulted from the cause that any such company was thereby obstructed.

RAILROADS—PLEADING—NAME OF NEGLIGENT AGENT.—It is not necessary for a complaint against a railroad company, for personal injuries and injuries to personal property received by the plaintiff while crossing a street obstructed by the defendant's stationary cars, to aver the name of the defendant's ser-

want or agent, through whose negligence the cars were allowed to stand in the street, where the plaintiff was not an employé of the company.

Action to recover damages. It was brought by Prather against the railway company. The original complaint contained three counts, but four more were afterward added by way of amendment. The seventh count averred that, on the occasion of the accident, a fire had broken out in the city of Anniston; that the plaintiff, who was chief of police of that city, and also a member of the fire company, started, immediately after the fire alarm was sounded, toward the house on fire, and, as it was his duty to do, went ahead of the hose carriages, to keep the way clear; that, coming to the street, over which the firemen would necessarily have to pass, he found it obstructed by the defendant's stationary cars; and that, in attempting to cross it, he was injured, as he alleged, "by the wantonness, recklessness, or willfulness" of defendant's agents or servants in failing or refusing to remove the cars, after becoming aware, as the plaintiff averred they were, that a house was on fire. The plaintiff was bruised by his fall, and his buggy and harness were broken and damaged. The several counts averred, substantially, that the alleged injuries were the result of the negligence of the defendant's agents or servants, whose names were unknown to the plaintiff. The defendant demurred to the several counts of the complaint, but these several demurrers were overruled, with the exception of that to the first count, which was sustained. There was a judgment for the plaintiff and the defendant appealed. The main contentions of the appellant were that the second count did not sufficiently set forth the ordinance relied on; that the name of the agent whose negligence was relied on should be shown, or that there was diligence used to ascertain it; that the averments of the seventh count did not show wanton negligence; and that there was no sufficient causal connection between the act complained of and the injury.

John B. Knox, for the appellant.

T. C. Sensabaugh, for the appellee.

⁵⁰² COLEMAN, J. The action is in case, and was instituted by the appellee to recover damages for personal injuries sustained, and for damages done to personal property.

Including counts added by amendment, the entire complaint consisted of seven counts. A demurrer was sustained to the

first count, and plaintiff withdrew the third count. This appeal is prosecuted from the rulings of the court upon the pleadings, adversely to the appellant, the defendant in the trial court.

The material questions raised by the grounds of demurrer to the fourth, fifth, and seventh counts of the complaint are, whether the injury sustained by plaintiff resulted proximately from the wrongful or negligent conduct of the defendant, as averred in these several counts. Pretermittin^g for the present the question as to whether the ordinance of the city of Anniston is sufficiently stated in the second count, each of the counts under consideration bases the cause of action upon the violation of certain ordinances of that city. The second count avers the existence of an ordinance which prohibited any railroad from allowing its cars to stand upon the public crossing of the streets for a longer period than five minutes. The fourth count undertakes to set out the city ordinance, which has a provision similar to that averred in the second count. The fifth count sets out the city ordinance, which declares it to be unlawful in placing cars or trains near any street crossing, "to fail to leave space free from obstruction, less than the full width of the roadway of the street, at such crossing." 593 The seventh count sets out an ordinance which declares that: "No person shall obstruct any street in any manner calculated to delay any company in carrying their apparatus to or from any fire," et cetera. It may be conceded, for the purpose of the argument, that each of these counts avers a violation by the defendant of the several municipal provisions set out in the several counts. The counts now under consideration show, however, that plaintiff approached the crossing in his buggy, and found it obstructed by the cars of the defendant, contrary to the city ordinances; that there were double tracks, both of which, it seems, from some of these counts, were occupied by the cars of the defendant. He undertook to drive around these cars, and made a "short turn" in order to get across, and in doing so his buggy collided with the rails of defendant's track so violently as to throw him upon the ground, to his personal injury.

The defendant is liable for all damage resulting proximately from a violation of valid city ordinances, made for the protection of the public, but is not liable for damages which do not result proximately from such causes; nor can it be said that a violation of a statute or ordinance made for the benefit or protection of certain persons or classes gives a right of action under all circumstances to persons or classes not within its purposes.

The defendant's cars remained stationary, and the injury resulted from the attempt of the plaintiff to cross the tracks in their obstructed condition.

In the case of *Elyon Land Co. v. Mingea*, 89 Ala. 521, 529, we said: "It is not negligence per se for one who knows the dangerous condition of a highway to persist in traveling over it. He may lawfully proceed to do so if the act, under the circumstances of the particular case, does not evince a want of ordinary care on his part." This case cited that of *City Council v. Wright*, 72 Ala. 411, 47 Am. Rep. 422. In the latter case, the facts are, that there had been a washout extending about two feet or more into the sidewalk, but there was a space of about seven feet, which furnished a safe way for pedestrians, and which was in constant use as such. In attempting to pass along the sidewalk at night, the plaintiff, who had knowledge of the defect, stepped into the washout and was injured. This court held that the plaintiff was not guilty of negligence per se in attempting ⁵⁰⁴ to walk along the sidewalk, but that it was a question for the jury. The decisions are not altogether in harmony as to what constitutes the proximate cause of an injury, resulting from obstructions of a highway: *Henry County v. Jackson*, 86 Ind. 111, 44 Am. Rep. 274, and note, 278; *Turner v. Buchanan*, 82 Ind. 147, 42 Am. Rep. 485; 16 Am. & Eng. Ency. of Law, 436, 440, and notes; *Railway Co. v. Staley*, 41 Ohio St. 118, 52 Am. Rep. 74. Under our construction, the complaint does not present the case of injury resulting to a person who abandons the highway and seeks a crossing by some other route. The counts, other than the seventh, clearly show that defendant had a double track, and that on one side its cars extended from one direction into the crossing, and on the other side its cars extended into the crossing from an opposite direction, and that there was sufficient space left of the public crossing over which plaintiff could pass, by driving in front of the cars on one side, and then, by making a short turn between the cars, he could pass in front of the cars on the other track, and never leave the highway. Putting this construction on these several counts, the action is brought within the influence of the cases of *Elyon Land Co. v. Mingea*, 89 Ala. 521, and *City Council v. Wright*, 72 Ala. 411, 47 Am. Rep. 422, and showed a good cause of action, but subject to the defense of contributory negligence.

The seventh count charges no more than simple negligence. The averment that the failure to remove the cars was wanton

negligence is a mere conclusion of the pleader, not authorized by the facts averred. It is not fairly inferable from the facts averred that the defendant placed the cars on the public crossing for the purpose of causing injury, or failed to remove them from any reckless indifference to consequences, being conscious that such failure would probably result in injury. In fact, it does not appear that the cars could have been removed, after notice, before plaintiff was injured: *Louisville etc. R. R. Co. v. Anchors*, 114 Ala. 492, 62 Am. St. Rep. 116; *Alabama etc. R. R. Co. v. Burgess*, 114 Ala. 587.

Again, the ordinance set out in this count declares that "no person shall obstruct any street in any manner calculated to delay any company in carrying their apparatus to or from any fire." The plaintiff bases his right of action in the seventh count upon the provision of this ordinance, but nowhere alleges that any company was ⁵⁹⁵ obstructed in carrying its apparatus to or from the fire, nor does it show that the damage resulted from the cause that any such company was thereby obstructed.

Good pleading requires the pleader to set out so much of an ordinance as is relied upon to support the cause of action, and not the mere conclusion of the pleader. In this respect the second count should be amended. Under the recent decisions of this court, plaintiff, not being an employé, was not required to aver the name of the agent of the defendant by whose negligence or misconduct the alleged injury was sustained: *Birmingham etc. Co. v. City Stable Co.*, 119 Ala. 615, post, p. 955, and authorities cited.

Reversed and remanded.

PLEADING—BREACH OF ORDINANCE, OR STATUTE.—The general rule is, that if a breach of a statute is relied upon by the plaintiff as a cause of action, he must show, not only that he is one of the class for whose benefit the statute was created, but also that the breach of the statute is the proximate cause of the injury: *Note to Wragge v. South Carolina etc. R. R. Co.*, 58 Am. St. Rep. 879. One who neglects to perform a specific duty, imposed upon him by a statute or municipal ordinance for the protection or benefit of others, is answerable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect: *Note to Railroad Co. v. Mackey*, 53 Am. St. Rep. 641.

RAILROADS—OBSTRUCTING STREET CROSSING.—It is negligence, as a matter of law, for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance: *Western etc. R. R. Co. v. Young*, 81 Ga. 897, 12 Am. St. Rep. 320. If a railway train is left standing in or across a street in a city for a length of time forbidden by law, a neglect of duty is implied: *Railroad Co. v. Mackey*, 53 Ohio St. 370, 53 Am. St. Rep. 641. A railroad company has no right

to unnecessarily obstruct streets by letting its cars stand across them: Note to Callanan v. Gilman, 1 Am. St. Rep. 843. As to a railroad company's general liability to persons who are injured while trying to pass over, under, or around cars standing on a crossing, see Spencer v. Baltimore etc. R. R. Co., 4 Mackay, 138, 54 Am. Rep. 269; Note to Studer v. Southern Pac. Co., 66 Am. St. Rep. 43; Lewis v. Baltimore etc. R. R. Co., 38 Md. 588, 17 Am. Rep. 521.

PLEADING—NEGLIGENCE.—THE NAME OF AN AGENT whose negligence is alleged to have caused an injury to one not an employé of the defendant need not be averred: Birmingham etc. Electric Co. v. City Stable Co., 119 Ala. 615, post, p. 955.

BIRMINGHAM RAILWAY AND ELECTRIC COMPANY v. CITY STABLE COMPANY.

[119 ALABAMA, 615.]

NEGLIGENCE—NAME OF NEGLIGENT AGENT NEED NOT BE PLEADED.—There is no rule of pleading which requires a complaint in an action against a railway company, to recover damages for injuries to one not an employé, to state the name of the person whose negligence is alleged to have caused the injury.

RAILROADS—DUTY OF, TOWARD ANIMALS, IN ONE'S CUSTODY, ON TRACK.—When a horse, in the custody of a person, is on a railway track, and its presence becomes known to the company, it thereafter owes the animal the same duty as to care that it would owe to a human being on the track.

RAILROADS—CROSSING TRACK OF.—IT IS NOT NEGLIGENCE, in itself, for one to cross over a railroad track wherever he may have occasion to do so, whether in the open country or within the limits of a town or village, and one who, for the purpose of crossing the track, goes upon it with care and caution and with all the assurance which his senses, properly exercised, can give him that it is safe to do so, may recover if he is injured by the railway company from some cause against which he could not guard.

STREET RAILWAY—DUTY TOWARD HORSE, IN ONE'S CUSTODY, ON TRACK.—When a person, having the right to do so, drives a horse upon a street railway track for the purpose of crossing it at that particular place, it becomes the duty of the motorman, not only to keep a lookout to observe him, but to run his car at such a rate of speed, on approaching the place, and to retain such control over it, that he may, if necessary, bring it to a full stop before striking the horse.

NEGLIGENCE — INSTRUCTIONS — REFUSAL OF—ACT NOT COVERED BY PLEAS.—An instruction which predicates the defendant's right to a verdict on an alleged act of contributory negligence should be refused where such act is not covered by the pleas.

INSTRUCTIONS—ASSUMING FACT.—An instruction which assumes a fact not proved should be refused.

NEGLIGENCE, CONTRIBUTORY—WHEN A QUESTION FOR THE JURY—CROSSING STREET RAILWAY TRACK.—Whether a person who had his horse and buggy injured by an electric-car while he was attempting to cross a street railway track was

gully of negligence, contributing proximately to the injury. is a question for the jury, where the attempt to cross was made at a place where the plaintiff had a right to cross.

Action for damages for injury to property. There was a judgment for the plaintiff and the railway company appealed.

Walker, Porter & Walker, for the appellant.

Cabiness & Weakley, for the appellee.

610 BRICKELL, C. J. Appellee sued to recover damages for injuries to a horse and buggy owned by it, caused by their being struck by an electric-car, operated by appellant, while they were in the care of one Pritchard, who had hired them. The demurrer to the complaint on the ground that it failed to aver the name of the motorman in charge of the car was properly overruled. There is no rule of pleading that requires a complaint in an action against a railroad company to recover damages for injuries to one not an employé, to state the name of the person whose negligence is alleged to have caused the injury. It has been held that a complaint by an employé under section 1749, subdivision 2, of the code of 1896, counting on the negligence of any person in the service of the employer who has any superintendence intrusted to him, or under subdivision 5 of the same section, counting on the negligence of any person in the service of the employer in charge or control of any signal, point, locomotive, et cetera, must allege the name of such person, or that his name is unknown to plaintiff: *Southern Ry. Co. v. Cunningham*, 112 Ala. 496; *Louisville etc. R. R. Co. v. Bouldin*, 110 Ala. 185. But in *McNamara v. Logan*, 100 Ala. 187, followed by and adhered to in *Woodward Iron Co. v. Herndon*, 114 Ala. 215, which overruled a conflicting decision in *Louisville etc. R. R. Co. v. Bouldin*, 110 Ala. 185, it was held that the above rule did not apply to a complaint under subdivision 1 of this section, counting on a defect in the ways, works, machinery, et cetera, for the reason that the injured employé could not be supposed to know the name of the person charged with the duty of keeping the ways, works, and machinery in proper condition. For a like reason the rule is inapplicable when the injury is sustained by one who is not an employé of the defendant.

The accident occurred at the intersection of Thirty-third street and Avenue F, along which avenue the electric railway runs from Birmingham to Avondale. 620 Thirty-third street is one block beyond and east of the corporate limits of Birming-

ham, and Avenue F is a continuation of Avenue F in Birmingham. Defendant had a station at this point, and there were seven or eight houses on the east side of Thirty-third street south of the railroad, and five or six on the south side of Avenue F, in the immediate vicinity of the place where the accident occurred, but there were no houses on the north side of the avenue, except a store about half a block from the place. On the north side of the track there had been a washout which left a hole extending from the track to the north side of the avenue from three to four feet in depth, sloping gradually from the track, but leaving on the north side a perpendicular embankment three or four feet in height over which it was impracticable to drive a horse. It was practicable, however, to drive across the track into the washout, and to emerge therefrom by driving along the avenue parallel with the track a short distance. Pritchard was driving at night north along Thirty-third street, and attempted to cross the track at this place. While on the track the horse stopped and refused to cross over. Pritchard alighted and attempted for two or three minutes before the car appeared to pull the horse across the track, but failed, and the car approaching from Birmingham struck the horse and knocked it from the track. The testimony showed without conflict that when the car reached Twenty-seventh street going east, the motorman turned on the full current and let the car run down grade at full speed, variously estimated by the witnesses at from twelve to twenty-five miles an hour. Just before reaching Thirty-third street the track makes a short curve, and when the car turned the curve it was running at so great a speed that it was impossible for the motorman to stop it within the distance at which the horse could be seen, about seventy feet, or within the distance its headlight illuminated the track.

The horse being in the custody of Pritchard, the same principles must apply with respect to the duty owing by defendant as apply in the case of a human being on a railroad track. If his act in driving on the track was that of a trespasser, those in charge of the car owed him no duty except to exercise due care to avoid the injury after the presence of the horse on the track ^{was} became known to them. But, if he had a right to drive on the track for the purpose of crossing it at this particular place, then it became their duty not only to keep a lookout to observe him, but also to run the car at such a rate of speed on approaching the place, and to retain such control over it,

as to be able to bring it to a full stop before striking the horse: *Glass v. Memphis etc. R. R. Co.*, 94 Ala. 581; *Nave v. Alabama etc. R. R. Co.*, 96 Ala. 264; *Central R. R. etc. Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50. As was stated in *Glass v. Memphis etc. R. R. Co.*, 94 Ala. 581, it is not negligence in itself for one to cross over a railroad track wherever he may have occasion to do so, whether in the open country or within the limits of a town or village, and one who, for the purpose of crossing the track, goes upon it with care and caution and with all the assurance his senses, properly exercised, can give him, that it is safe to do so, may recover if he is injured from some cause against which he could not guard. He is not, under such circumstances, a trespasser, and the railroad company owes to him, while in the act of crossing, the same duty it owes to one who has a right to be on the track. This is particularly true under the facts of this case. Avenue F at the place of the accident, being one block from the city limits and having houses built on each side thereof, was undoubtedly a public thoroughfare. The public had the right to use both sides of the street and to cross the track at any suitable point for the purpose of getting from one side to the other, and it was the duty of those in charge of the cars of defendant to retain such control over the cars on approaching this place as to be able to bring them to a full stop before striking one in the act of crossing the track. This duty was not suspended by the mere fact that a washout had occurred on the north side of the track. It does not appear how long the washout had existed. It may have been of recent origin, in which case the defendant was certainly not relieved from the duty of exercising the same care to avoid injuring persons driving along Thirty-third street and crossing the track that it owed before the washout occurred. We are of the opinion the uncontradicted evidence shows that defendant was guilty of negligence in running the car at so great a rate of speed as to be unable to avoid injury to one in the act of crossing the track at this point.⁶²² Whether Pritchard was guilty of negligence, in the particulars alleged in the special pleas, which contributed proximately to the injury, was properly submitted to the jury. The only particulars in which he is charged with such contributory negligence are: 1. In driving upon the track immediately in front of the car; 2. In allowing the horse and buggy to remain on the track on a curve; 3. In allowing the horse and buggy to stand on the track at a point where they could not be seen by the motorman until it was too late to

avoid the injury. The evidence does not sustain the plea in the first particular, since it shows that Pritchard was on the track trying to pull the horse across two or three minutes before the car came within sight. Assuming that his failing to attempt to back the horse off the track was equivalent to permitting it to remain on the track, as charged in the plea, it was for the jury to determine, under all the circumstances, whether this failure contributed to the injury. In view of these averments of the plea of contributory negligence, charges 3, 4, and 5, requested by appellant, were properly refused because, besides assuming that Pritchard had knowledge of a safer crossing, they predicate defendant's right to a verdict upon his negligence in selecting the more dangerous of two crossing places, which act of contributory negligence is not charged in the pleas. Charge 6 was erroneous and properly refused because it assumes that an effort to back the horse off the track would have been successful, and that the failure to make such effort contributed to the injury. The other charges requested by appellant were properly refused, for reasons already stated. We discover no error prejudicial to appellant in those parts of the court's oral charge to which exceptions were reserved.

The judgment of the court below is affirmed.

PLEADING—NEGLIGENCE.—THE NAME OF AN AGENT whose negligence is alleged to have caused an injury to one not an employé of the defendant need not be averred: *Southern Ry. Co. v. Prather*, 119 Ala. 588, ante, p. 949.

RAILROADS—CROSSING TRACK—CONTRIBUTORY NEGLIGENCE—LIABILITY.—It is not negligence to cross a railroad track; nor is it necessarily negligent for one to be upon a railroad track, even where he has no right to be: *Vicksburg etc. R. R. Co. v. McGowan*, 62 Miss. 682, 52 Am. Rep. 205, and note. If a person, who is on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving train, he is not chargeable, in law, with negligence for assuming that there is no car sufficiently near to make the crossing dangerous: *Ernst v. Hudson River R. R. Co.*, 85 N. Y. 9, 90 Am. Dec. 761. A railroad company is not answerable in damages for injuries caused by a locomotive striking a traveler crossing the track with a wagon, where the evidence shows that the traveler did not exercise reasonable care to avoid a collision with the approaching train: *Blackwell v. St. Louis etc. R. R. Co.*, 47 La. Ann. 268, 49 Am. St. Rep. 371. The question of contributory negligence, in such cases, is generally one for the jury: *Pennsylvania R. R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597.

STREET RAILWAYS—CROSSING TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—It is the duty of the gripman of a street railway car to keep his eyes on the track before him, and to keep hold of the grip or brake to avoid injury to persons or vehicles crossing the track: *Note to Gilmore v. Federal St. etc. Ry. Co.*, 84 Am. St. Rep. 684. Although a person, with a wagon, drives incautiously upon a street railway track at a public crossing, the company can-

not recklessly run him down, and then shield itself from liability on the ground that such person was negligent in the first instance: *Hall v. Ogden etc. St. Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726. A plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him: *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 67 Am. St. Rep. 621. The question as to whose negligence was the direct and proximate cause of an accident is one of fact for the jury: *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 67 Am. St. Rep. 621; *McQuillan v. Seattle*, 10 Wash. 464, 45 Am. St. Rep. 799; *Kansas City etc. R. R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753.

NEGLIGENCE—PLEADING.—A recovery for negligence cannot be had upon a ground not alleged in the declaration: *Mitchell v. Prange*, 110 Mich. 78, 64 Am. St. Rep. 329.

INSTRUCTIONS WHICH ASSUME FACTS should be refused: *Arneson v. Spawn*, 2 S. Dak. 269, 39 Am. St. Rep. 783; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218.

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ABSTRACTS OF TITLE.

ABSTRACTS OF TITLE—LIABILITY OF ABTRACTER.—

An abstracter of titles employed by a landowner desiring to obtain a loan to make an abstract of the title to such property, who negligently fails to set out in such abstract an existing *lis pendens*, is liable therefor to the lender, who, before making the loan, informs such abstracter that he shall rely entirely upon his abstract, and is informed by the latter that he can so rely. (*Brown v. Sims*, 308.)

ACCIDENT.

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ACCOUNTING.

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ACCRETIONS.

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ACKNOWLEDGMENTS.

1. **ACKNOWLEDGMENTS—HOMESTEAD.**—A certificate of acknowledgment by a married woman uniting with her husband in a deed or mortgage in alienation of the homestead is to be liberally constructed. A literal compliance with statutory forms is not exacted of such an instrument. (*Frederick v. Wilcox*, 925.)

2. **ACKNOWLEDGMENTS. — A LITERAL COMPLIANCE WITH THE STATUTORY FORMS** of acknowledgment to conveyances is not exacted. A fair compliance is sufficient; and, to determine this, the certificate of acknowledgment may be read in connection with the deed. So, where there are two certificates to a mortgage, as in the case of a husband and wife, the certificates may be read in connection with the mortgage, and with each other, for the same purpose. (*Frederick v. Wilcox*, 925.)

3. **ACKNOWLEDGMENT BY WIFE—MAXIM AS TO CERTAINTY.**—The omission of a husband's name in his wife's acknowledgment of a mortgage, executed by both, at the place therefor in the recital, and in the place of which name is a blank, does vitiate the acknowledgment, if his identity is shown by the two certificates and the mortgage. *Id certum est quod certum reddi potest.* (*Frederick v. Wilcox*, 925.)

ACTIONS.

1. **ACTIONS—PLEAS IN ABATEMENT.**—If a party pleads a former suit pending, in abatement of a second suit, he must allege clearly that the cause of action of the first is identical with

that of the second suit; otherwise, his plea is insufficient. (*Beardsley v. Morrison*, 795.)

2. **ACTIONS — REVIVOR — PARTIES.**—Proceedings in revivor are not necessary in substituting another next friend for one who has previously acted for infant. (*Missouri Pac. Ry. Co. v. Moffatt*, 343.)

See Costs, 1; Damages, 2-4; Husband and Wife, 1-7; Judgments, 8, 9; Marriage and Divorce, 2; Municipal Corporations, 23; Negligence, 1-4; Officers, 1, 2; Parent and Child; Sales, 1; Seduction, 2.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION OF SURFACE DOES NOT CARRY MINERAL THEREUNDER.**—Possession of the surface of land and residence thereon for the statutory period of limitation do not convey title to coal and mineral thereunder in place, if the title to the surface and to the mineral has been previously severed, although the deed under which possession is held makes no reservation of such coal and mineral. (*Catlin Coal Co. v. Lloyd*, 216.)

2. **ADVERSE POSSESSION — COLOR OF TITLE — OCCUPANCY OF PART.**—Possession of part of a tract of land under color of title to the whole tract is possession of the whole tract described in the deed. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

3. **ADVERSE POSSESSION—TITLE BY—ACCRETIONS.**—Adverse possession of land under color of title and payment of taxes for the time required by statute to give title, gives title also to accretions to the land formed during that time, regardless of the question of how recently such accretions have formed. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

AGENCY.

1. **AGENCY—EQUIVOCAL SALES BY AGENT OF UNDISCLOSED PRINCIPAL—RIGHT OF SETOFF AGAINST AGENT—HOW TO ACQUIRE.**—If a person sells goods in an equivocal manner, sometimes on his own account and sometimes as the agent for an undisclosed principal, the buyer is not entitled to set off a debt due from the seller in any transaction, unless he inquires in what character the seller is acting in that particular transaction. If it turns out, as it did in this case, that he bought of an undisclosed principal, he ought not to be allowed the benefit of any setoff. (*Baxter v. Sherman*, 631.)

2. **AGENCY—UNDISCLOSED PRINCIPAL—BUYER'S RIGHT OF SETOFF AGAINST AGENT.**—If the owner of goods intrusts them to an agent, with authority to sell in his own name, without disclosing the name of his principal, and the agent so sells, to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, he may set off any demand he may have on the agent against a demand for the goods made by the principal. This rule does not obtain where the purchaser knows that the agent is not the owner of the goods, or when circumstances are brought to his knowledge which ought to have put him upon inquiry, and by investigating which he would have ascertained that the agent was not the owner. (*Baxter v. Sherman*, 631.)

3. **AGENCY—UNDISCLOSED PRINCIPAL—RIGHT OF SETOFF AGAINST AGENT.**—If an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent, unless, in making the purchase, he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his account. (*Baxter v. Sherman*, 631.)

4. AGENCY—UNDISCLOSED PRINCIPAL—SETOFF AGAINST AGENT—HOW AFFECTED BY CUSTOM.—If fruit and produce is sold by the agent of an undisclosed principal, a local custom of the dealers in such goods, at the place of sale, to settle their accounts with each other by balancing and offsetting all outstanding bills between themselves, without regard to whether such bills are due to or from them as factors or as principals, does not of itself give the buyer any right to set off a debt due him from the agent, and is, therefore, no defense to a suit brought by the principal against the buyer for the price, particularly where such custom was unknown to the plaintiff. (*Baxter v. Sherman*, 631.)

See Mortgages, 1; Negligence, 31; Parties, 2; Railroads, 16.

AGISTMENT.

1. AGISTMENT—LIEN FOR THE KEEPING OF ANIMALS.—A statute declaring that "persons keeping livestock for hire shall have the same rights and remedies for the recovery of their charges therefor as innkeepers have," gives to anyone keeping livestock for compensation a lien for such compensation—a lien like that of an innkeeper. In such cases, it is the keeping, and not possession alone, which gives rise to the lien. (*Lambert v. Nicklass*, 828.)

2. AGISTMENT—LOSS OF LIEN BY ATTACHMENT.—One who keeps livestock for compensation, and who has a statutory lien thereon for such keeping, does not lose it by levying an attachment upon the property, particularly where the officer lets the lien owner keep it in his custody. (*Lambert v. Nicklass*, 828.)

ALLUVION.

See Waters and Watercourses, 2, 5.

AMENDMENT.

See Equity, 5; Garnishment, 1; Insurance, 7; Pleading, 1, 2; Replevin, 1.

ANIMALS.

See Agistment, 1; Railroads, 2, 24.

APPEAL.

1. APPEAL—BONDS ON—RIGHTS OF SURETY.—A surety upon an appeal bond, conditioned for the payment of any judgment finally recovered against his principal, is not entitled, in the absence of fraud, to have a judgment against his principal opened or vacated and to have the right to defend, if his principal has no such right. (*Ingersoll v. Seaton*, 892.)

2. APPEAL—FINDINGS OF FACT—REVERSAL OF ORDER. If a trial court makes findings of fact, when it is unnecessary to do so, as the basis of its order, and omits to find all facts legally necessary to sustain the order, it will be reversed unless the record shows conclusively that the order is right. (*Sjoberg v. Security Sav. etc. Assn.*, 616.)

3. APPEAL—FINDINGS—OPINION.—A finding of facts cannot be disregarded on appeal simply because it was filed subsequently to the rendering of the decision of the court, when, under the statute, the time and order of filing the finding of facts and entry of judgment are merely directory. The opinion of the court in deciding the case, setting forth its reasons for the judgment, is not a finding of facts within the meaning of such statute. (*Victor Gold etc. Min. Co. v. National Bank*, 767.)

4. APPEAL—NONPREJUDICIAL REFUSAL TO GIVE INSTRUCTIONS.—Where an instruction, which correctly states the

law, and might with propriety be given, is asked for and refused, such refusal does not constitute reversible error when shown to have been without prejudice. (*Perham v. Portland Electric Co.*, 730.)

5. APPEAL.—PRESUMPTIONS ARE IN FAVOR OF THE FINDINGS and conclusions of the trial court, especially when the evidence is conflicting, and such presumptions must prevail unless the weight of evidence is clearly the other way. (*Jarvis v. Northwestern Mut. Relief Assn.*, 895.)

6. APPEAL—REJECTION OF IMMATERIAL EVIDENCE.—A trial court commits no error in refusing to permit a defendant to introduce immaterial evidence. (*Carlson v. St. Louis River etc. Co.*, 610.)

7. APPEAL—WHAT CANNOT BE URGED ON, FOR THE FIRST TIME.—An objection that a bill in chancery was not signed by an attorney cannot be taken for the first time in the appellate court. (*Jones v. Shufflin*, 848.)

8. APPEAL—ASKING MORE FAVORABLE JUDGMENT.—A party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below. (*Phillips v. Reynolds*, 107.)

9. APPELLATE PRACTICE.—CREDIBILITY OF EVIDENCE, the meaning and force thereof, and its sufficiency, are questions for the jury, and, upon a writ of error or appeal, its determination cannot be interfered with. (*Cadwallader v. Hirschfeld*, 671.)

See Fixtures, 1; Judgments, 1; Mechanics' Liens, 1; Parties, 1; Taxes, 5.

ARCHITECTS.

See Negligence, 6.

ASSAULT.

See Railroads, 10.

ASSIGNMENT.

See Attorney and Client, 2, 5; Checks; Debtor and Creditor, 4; Judgment, 6; Mortgages, 1.

ASSOCIATIONS.

1. ASSOCIATIONS — BENEFIT SOCIETIES—INSOLVENCY—RIGHTS OF MEMBERS.—A member of an insolvent foreign benefit society cannot, through garnishment proceedings commenced after the appointment of a receiver in the state where such society is incorporated and before the appointment of an ancillary receiver in another state, subject property of such society within the latter state, to a judgment upon a membership certificate maturing after the institution of insolvency proceedings, but before a receiver is appointed. (*Wheeler v. Dime Sav. Bank*, 521.)

2. BENEVOLENT SOCIETIES — CHANGE IN BY-LAWS—VESTED RIGHTS.—If the contract between a benefit society and a member thereof requires compliance on the part of the latter with any by-laws that may thereafter be enacted and the certificate of membership is accepted with similar stipulations therein, the member has no vested right to have the contract in such certificate remain unchanged, and the society may change it from time to time by reasonable by-laws. (*Fullenwider v. Supreme Council Royal League*, 239.)

3. BENEVOLENT SOCIETIES—RIGHT TO CHANGE BY-LAWS.—If the contract between a member and a benefit society

contains an express provision reserving the right in the society to amend or change its by-laws, and if, in the certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the society and fund, or that may thereafter be enacted for such government, and such conditions are assented to and the member accepts the certificate under such conditions, that is a sufficient reservation of the right in the society to amend or change its by-laws. (*Fullenwider v. Supreme Council Royal League*, 289.)

ASSUMPSIT.

ASSUMPSIT—MONEY HAD AND RECEIVED—EXEMPTION FROM ADMINISTRATION.—Whenever a defendant has money which, *ex aequo et bono*, belongs to the plaintiff, an action for money had and received may be supported. Hence, if a testator dies, leaving a widow, with whom he was not living at the time of his death, and a married daughter under twenty-one years of age, but no family relation exists between the widow and daughter, and a personal property exemption, of the value of one thousand dollars, is set apart to them, which property is delivered to the widow and converted by her into money, which she claims as her own, exclusively, one-half of the money so received by her becomes, at the election of the daughter, money had and received to the latter's use, for the recovery of which she may maintain *assumpsit*. (*Lanford v. Lee*, 914.)

ATTACHMENT.

1. ATTACHMENT—CLAIM BY THIRD PERSON—TRIAL OF RIGHT OF PROPERTY.—When a sheriff attaches property to which a claim is interposed by a third person, there can be no statutory trial of the right of property until a claim bond is filed accompanied by an affidavit of a just claim, as required by the statute. A claim bond, unaccompanied by such affidavit, does not justify the sheriff's delivery of the property to the claimant. (*Smith v. Heineman*, 150.)

2. ATTACHMENT—EXECUTORS OR ADMINISTRATORS.—PROPERTY IN CUSTODIA LEGIS cannot be attached; and money, credits, and property are in the custody of the law when held by executors, administrators, guardians, and like quasi officers in their representative and administrative capacity. (*Brewer v. Hutton*, 804.)

3. ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—LEGISLATION SUBJECTING IT TO GARNISHMENT—VALIDITY OF.—Any legislation by a state in which a debt due to a nonresident creditor is garnished, which attempts to acquire jurisdiction over the debt by declaring it to be property within its limits, subject to seizure by service of process on the garnishee, and service by publication on the nonresident defendant, is a mere nullity, and incapable of binding such persons or property in the tribunals of another state where the creditor has his domicile. (*Louisville etc. R. R. Co. v. Nash*, 181.)

4. ATTACHMENT—GARNISHMENT—DEBTOR OF DECEDENT'S ESTATE—EXECUTOR OR ADMINISTRATOR.—Neither a debtor of a decedent's estate, nor the executor or administrator thereof, as such, is subject to garnishment, because it would disturb the law of administration to allow it. (*Brewer v. Hutton*, 804.)

5. ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—CONFLICT OF LAWS—JURISDICTION.—The courts of one state do not have, and cannot acquire, any jurisdiction to attach and condemn a debt due to a nonresident and payable in the state of his residence, by service of process on his debtor as garnishee, in the absence of personal service within the state of suit on

the creditor, or his voluntary appearance. (*Louisville etc. R. R. Co. v. Nash*, 181.)

6. ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—DISCHARGE OF BY GARNISHMENT PROCEEDING.—As the situs of a debt for the purpose of garnishment is at the domicile of the creditor, and as a debt due to a nonresident is not property within the state, it cannot be discharged by a garnishment proceeding where there has been no personal service on the defendant within the state, or a voluntary appearance by him. Under such circumstances, any judgment rendered against the creditor, as well as any judgment, the effect of which is, on its face, to discharge the debt due to the nonresident by requiring the debtor, the garnishee, to pay it to the nonresident's creditor, is without due process of law and void. (*Louisville etc. R. R. Co. v. Nash*, 181.)

7. ATTACHMENT—GARNISHMENT—DEBT DUE TO NON-RESIDENT—PAYMENT OF JUDGMENT, BY GARNISHEE, AS A DEFENSE.—If a railway company is garnished for a debt due from it to a nonresident creditor, payable in the state of his residence, but there is no personal service within the state of suit on the creditor, and he does not voluntarily appear, the payment by the company of a judgment rendered against it, under such circumstances, as garnishee, does not constitute any defense to a subsequent suit, brought by the creditor in the state of his domicile, to recover the debt of the company. (*Louisville etc. R. R. Co. v. Nash*, 181.)

8. ATTACHMENT—GARNISHMENT—DUE PROCESS OF LAW.—The garnishment and condemnation of a debt due to a nonresident, without personal service within the state of suit on the defendant or owner of the debt, or his voluntary appearance, is without due process of law. The question is not one of jurisdiction over the garnishee, but one of jurisdiction over property situated without the state, and, through the seizure of such property, over the owner thereof. (*Louisville etc. R. R. Co. v. Nash*, 181.)

9. ATTACHMENT.—THE PRESUMPTION IS that property levied upon as that of the defendant is liable to attachment, and there is imposed upon the sheriff a prima facie liability to preserve and apply the property to the judgment when rendered; but this presumption is disputable, and the defendant may show that the property was not, in fact, subject to levy. (*Smith v. Heineman*, 150.)

10. ATTACHMENT.—THE SITUS OF A DEBT FOR THE PURPOSE OF GARNISHMENT is at the domicile of the creditor, and not that of the debtor. (*Louisville etc. R. R. Co. v. Nash*, 181.)

See Agistment, 2; Sheriffs, 1, 2, 4-7.

ATTORNEY AND CLIENT.

1. COUNSEL FEES TO PERSONS INTERESTED IN A TRUST Fund are not recoverable in an action to enforce the trust, either from the trustees personally or out of such fund. (*Estate of Cole*, 854.)

2. ATTORNEY AND CLIENT—ASSIGNMENT—CONFIRMATION OF LIEN.—A writing from a client authorizing his attorney to retain, as compensation, a part of any recovery of money had by judgment, amounts to an assignment, and does not destroy, but confirms, the attorney's common-law lien upon the judgment for his compensation. (*Bent v. Lipscomb*, 815.)

3. ATTORNEY AND CLIENT—LIEN OF ATTORNEY FOR DISBURSEMENTS.—A judgment of the trial court, entered in accordance with the mandate of the supreme court for costs and disbursements by plaintiff's attorneys, because of their client's insolvency, is impressed with a lien in favor of such attorneys, para-

amount to all claims, and such lien can be discharged or the judgment satisfied only by payment to such attorneys, and cannot be set off against other judgments against their client. (*Victor Gold etc. Min. Co. v. National Bank, 767.*)

4. ATTORNEY AND CLIENT—LIEN UPON JUDGMENT.—At common law, an attorney has a lien, for his compensation, upon a judgment recovered by him for his client; and a writing authorizing him to retain, as compensation, a part of any recovery of money had by judgment, also gives him a lien upon the judgment. (*Bent v. Lipscomb, 815.*)

5. ATTORNEY AND CLIENT—LIEN UPON JUDGMENT—ASSIGNMENT OF JUDGMENT—NOTICE.—The lien of an attorney at law, upon a judgment recovered by him for his client, for his compensation, is good as against an assignee of the judgment, although the latter was without notice of the lien. The assignee of the judgment takes it subject to the attorney's rights. (*Bent v. Lipscomb, 815.*)

AVULSION.

See *Waters and Watercourses, 7.*

BAILMENTS.

1. BAILMENTS—SAFETY DEPOSIT COMPANIES—CARE REQUIRED OF.—A safety deposit company, without any special contract to that effect, is a bailee or depositary for hire, and as such is bound to exercise ordinary care and diligence in the preservation of property intrusted to it. Ordinary care and diligence in such case is such as every prudent man takes of his own goods. (*Mayer v. Brensinger, 196.*)

2. BAILMENTS—SAFETY DEPOSIT COMPANIES—CARE REQUIRED OF—QUESTION FOR JURY.—The question whether a safety deposit company used proper care in keeping property intrusted to it is for the jury, when it is shown that the company's clerk, knowing that a depositor affected with brain trouble was then in a hospital, permitted strangers to have access to his deposit box without identification or authority, except that they had a key to such box, and power of attorney from the depositor, which was not retained by such clerk. (*Mayer v. Brensinger, 196.*)

BANKS AND BANKING.

1. BANKS AND BANKING—APPLICATION OF DEPOSIT UPON DEPOSITOR'S OBLIGATION.—A bank may in good faith charge against the deposit of a correspondent bank a certificate of deposit issued by the latter and coming into the former's hands, and such transaction effects an absolute assignment pro tanto of the deposit, good as against the holder of a check drawn upon such deposit and delivered to the payee before, but not presented to the drawee until after, the consummation of the assignment to the drawee, no prior notice of the check having been given to the drawee. (*Wyman v. Port Dearborn Nat. Bank, 259.*)

2. BANKS AND BANKING—APPLICATION OF DEPOSIT UPON OBLIGATION OF DEPOSITOR—RIGHTS OF CHECK-HOLDER—SUBROGATION.—Where the payee of a check drawn by one bank upon another is deprived of his rights under the resulting equitable assignment of the deposit by the act of the drawee bank, before notice or presentation of the check, in applying the deposit of the drawer to the satisfaction of an obligation of the drawer held by the drawee, the payee is entitled to be subrogated to the rights of the latter in collateral securities held by it as security for the obligations of the drawer, in so far as such securities are unnecessary

to the proper reimbursement of the drawee. This right of subrogation is enforceable as against the drawer and those claiming under it by title or lien subsequent to the delivery of the check. (*Wyman v. Port Dearborn Nat. Bank*, 259.)

BENEFICIARIES.

See Insurance, 4; Trusts, 6, 9.

BENEFIT SOCIETIES.

See Associations, 1, 2.

BOARDS OF HEALTH.

1. **BOARDS OF HEALTH—QUARANTINE REGULATIONS.**—Although a resolution of a state board of health that no persons shall be allowed to enter a locality infected with a contagious or infectious disease previously placed by it in quarantine, is intended especially to prevent a certain vessel from landing its passengers in such locality, this does not render such action illegal, nor make such board, nor members thereof, liable for damages resulting therefrom. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

2. **BOARDS OF HEALTH—QUARANTINE REGULATIONS.**—A state board of health is an agent of the state, and not liable for damages sustained by a vessel which has been lawfully prevented by it from landing its goods and passengers within a locality in the state infected by a contagious or infectious disease. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

3. **BOARDS OF HEALTH—QUARANTINE REGULATIONS.**—Under a statute entitled, "An act to establish a state board of health, and to authorize the regulation of the isolation of infectious and contagious diseases," and conferring on such board general supervision for the control of such diseases to accomplish their subsidence and prevent their spread, and also giving such board the right to regulate intercourse with infected places, and, in its discretion, to prohibit the introduction of any person into an infected locality, such board is authorized to prohibit the introduction into an infected locality of persons from a foreign country, whether such persons are immunes, or the place from which they come is infected with such diseases or not. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

BONA FIDE PURCHASERS.

See Judicial Sales, 5; Municipal Corporations, 9.

BONDS.

BONDS—MUNICIPAL—COMPELLING PAYMENT OF.—An owner, who obtains judgment against a city on municipal bonds valid when issued, is entitled to recover the amount of such judgment from the city, although the payment of such bonds might have been compelled by mandamus as they fell due. (*Hammond v. Place*, 543.)

See Appeal, 1; Estoppel, 5; Guardian and Ward, 1, 2; Municipal Corporations, 2; Parties, 1.

BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATION—APPOINTMENT OF RECEIVERS OF.**—A court of equity has jurisdiction to wind up the affairs of a building and loan association, when the purposes for

which it was organized have failed, and may appoint a receiver therefor, upon the application of one or more of its stockholders, where it is shown that the association is insolvent, or is unable to pay its debts, or has violated any law binding upon it. (*Sjoberg v. Security Sav. etc. Assn.*, 616.)

2. BUILDING AND LOAN ASSOCIATIONS—POWERS—PURCHASE OF REALTY.—A building and loan association having power by its charter to raise funds to be loaned to its members, and to purchase realty, upon which it holds an encumbrance, and freely deal with and dispose of the same, has no power to invest its money in real estate upon which it holds no lien and in which it has no interest. (*National Loan etc. Assn. v. Home Sav. Bank*, 245.)

3. BUILDING AND LOAN ASSOCIATIONS—RECEIVER FOR, WHEN NOT JUSTIFIED.—Although the assets of a building and loan association become so depreciated that it is impossible for the corporation to mature its stock according to its contract with its stockholders, and that they are not sufficient to pay back to the stockholders the money actually paid on their stock, such depreciation of assets does not justify the appointment of a receiver for the association, on the ground of insolvency, for it does not constitute insolvency, where there are no general creditors or liabilities of the corporation, except to its stockholders on account of their stock, but merely a loss of corporate capital, and resulting depreciation in the value of its stock. (*Sjoberg v. Security Sav. c. Assn.*, 616.)

4. BUILDING AND LOAN ASSOCIATIONS—RECEIVER OF—WHO REPRESENTS.—The receiver of a building and loan association represents the corporation itself, and not the shareholders, and he succeeds to all rights of action which had accrued to the corporation, but not to the rights of action which rested with the shareholders. (*Young v. Stevenson*, 236.)

5. BUILDING AND LOAN ASSOCIATIONS—RIGHT TO COMPEL MEMBER TO REFUND.—Where the withdrawal value of a member's shares is ascertained by the statute and by-laws of a building and loan association, the parties may apply such value to the payment of the member's note to the association, but this does not vest a right of action in the association to compel the withdrawing member to rescind the transaction, on the ground that the association was then insolvent and the transaction a fraud upon non-withdrawing members. (*Young v. Stevenson*, 236.)

6. BUILDING AND LOAN ASSOCIATIONS—RIGHT TO COMPEL MEMBER TO REFUND WITHDRAWAL.—A member of a building and loan association, who, in compliance with the statute and by-laws of the association, has exercised the right to surrender his shares of stock and has received the amount to which he is entitled therefor, while the association is a going concern, cannot be required by it or its receiver to rescind the transaction and refund the amount so received on the ground that the association was then insolvent and that the distribution was unjust to non-withdrawing members. If any right of action exists, it is in the members who remain and suffer by such withdrawal. (*Young v. Stevenson*, 236.)

7. BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL—RIGHT TO COMPEL REPAYMENT.—The fact that the relation of stockholders in a building and loan association is, in many of its aspects, that of copartners, does not invest the association with a right of action to compel repayment of an amount received by a shareholder on withdrawal of his stock. (*Young v. Stevenson*, 236.)

See Receivers, 5.

BURDEN OF PROOF.

See Deeds, 2; Fraudulent Conveyances, 1, 3, 4, 8; Sheriffs, 1, 2.

CARRIERS.

1. CARRIERS—DIFFERENCE BETWEEN RATES SPECIFIED IN BILL OF LADING AND THOSE ESTABLISHED BY SCHEDULE.—Under the act of Congress, known as the "interstate commerce law," one who has obtained from a common carrier the transportation of goods from one state to another at a rate, specified in the bill of lading, less than the published schedule rates, filed with and approved by the interstate commerce commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment or tender of payment, of such amount. (*Southern Ry. Co. v. Harrison*, 936.)

2. CARRIERS—DUTIES AND OBLIGATIONS—ENFORCEMENT OF.—If a corporation undertakes to operate a railroad franchise, it assumes all the duties and obligations which spring by law from the character of its business and from the customs incidental to it. It tenders a continuing offer to the general public that it will perform these duties for the benefit of each and every one of them, when demanded, and, when any member of the public makes a demand upon it under such general offer, there immediately results a civil obligation on the part of the company, in favor of the party making the demand, enforceable through the usual legal remedies by which contracts are enforced. (*Cumberland etc. Co. v. Morgan's etc. R. R. Co.*, 442.)

3. CARRIERS—DUTIES AND OBLIGATIONS—ENFORCEMENT OF BY MANDAMUS.—A person to whom a common carrier owes a specific obligation, which it refuses to perform, may seek to enforce such obligation by proceedings in mandamus, and cannot, to the exclusion of that remedy, be driven by the corporation to an action for damages, nor can the latter, by the payment of money, leave unperformed a specific affirmative legal duty. (*Cumberland etc. Co. v. Morgan's etc. R. R. Co.*, 442.)

4. CARRIERS—DUTY TO PROTECT PASSENGERS.—A common carrier is bound, as far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of his own servants engaged in executing the contract. (*Haver v. Central R. R. Co.*, 647.)

5. CARRIERS—LIABILITY FOR NEGLIGENCE TO PERSON RIDING ON PASS.—If a person agrees with a carrier to enter into its employment at a certain place in the future, and, in consideration of the mutual interests of both, a free pass is given to such person to the place of employment, with conditions on the back rendering the carrier nonliable for injuries caused by its negligence, or that of its agents, and, in traveling on such pass to the place of employment, such person is injured by the negligence of the carrier's agents, he must be regarded as a passenger for hire and not an employé, and the carrier is liable for damages caused the passenger by such negligence. (*Williams v. Oregon Short Line R. R. Co.*, 777.)

6. COMMON CARRIERS—RIGHT TO LIMIT LIABILITY FOR NEGLIGENCE.—A common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants. This rule applies to carriers both of goods and passengers, and with special force to the latter. (*Williams v. Oregon Short Line R. R. Co.*, 777.)

See Conflict of Laws, 1, 3.

CHECKS.

ASSIGNMENT OF DEPOSIT, CHECKS AS.—A check operates as an absolute assignment pro tanto of the fund upon which it is drawn from the time it is delivered, as between the drawer and the payee, but the bank is not bound until the check is presented. (*Wyman v. Port Dearborn Nat. Bank*, 259.)

CLOUD ON TITLE.

1. CLOUD ON TITLE—STREET ASSESSMENT.—Under a statute which authorizes an action to quiet title against anyone claiming an interest in land adverse to the owner, an action may be maintained to remove a street assessment as a cloud upon the title, although the assessment is apparently barred by the statute of limitations. (*Kinsman v. Spokane*, 24.)

2. CLOUD ON TITLE—STREET ASSESSMENT—FAILURE TO ALLEGE TENDER DOES NOT RENDER COMPLAINT DEMURRABLE.—In an action to remove a street assessment as a cloud upon title, the complaint is not demurrable because it fails to allege a tender of the amount of the assessment, especially where the statute of limitations has run against the assessment, and it is alleged that the city's claim was, in the first instance, without foundation and wrongful. (*Kinsman v. Spokane*, 24.)

COLLATERAL ATTACK.

See Judicial Sales, 2, 6.

COMPOUNDING FELONY.

See Equity, 1.

CONFIRMATION.

See Attorney and Client, 2; Judicial Sales, 1.

CONFLICT OF LAWS.

1. CONFLICT OF LAWS—CARRIERS FROM ONE STATE TO ANOTHER.—A contract for the transportation of goods by a common carrier from one state or country to another is, as a general rule, governed by the law of the place where it is made and where the performance begins, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other state or country. (*Southern Ry. Co. v. Harrison*, 936.)

2. CONFLICT OF LAWS—JURISDICTION OVER PERSONS OR PROPERTY WITHOUT THE STATE—VOID JUDGMENT.—If a nonresident has no property within a state where judicial proceedings are instituted against him, and there has been no personal service on him within the state, or voluntary appearance by him, there is nothing upon which its tribunals can adjudicate, and any judgment rendered under such circumstances, whether affecting the per-

son only, or the property also, is void for want of jurisdiction of the person and of the subject matter, for no state can exercise direct jurisdiction and authority over persons or property without its territory. (Louisville etc. R. R. Co. v. Nash, 181.)

3. CONFLICT OF LAWS—NATIONAL LEGISLATURE, WHEN PREVAILS—CARRIERS.—In cases where the subject matter of a contract is exclusively one of national cognizance, and Congress has enacted a law for its complete regulation, the parties must be presumed to have contracted with reference to the act of Congress and its effect on the subject matter, and not with reference to the law of the state where the contract was made, for they could not, by agreement or otherwise, make any other law the applicatory law in the determination of the nature, validity, or interpretation of the contract. (Southern Ry. Co. v. Harrison, 986.)

See Attachment, 5.

CONSENT.

See Incest; Larceny; Rape.

CONSIDERATION.

See Deeds, 1; Equity, 1; Fraudulent Conveyances, 1-4.

CONSTITUTIONS.

1. CONSTITUTIONAL LAW—CITIZENS OF ONE STATE HAVE IN OTHER STATES the same rights and remedies in relation to the maintenance of actions as the citizens thereof. (Steed v. Harvey, 789.)

2. CONSTITUTIONAL LAW—EQUAL PROTECTION.—The federal constitution, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws," secures to every person within the jurisdiction of the state, whether a citizen or resident or not, the protection of its laws equally with its own citizens. This protection means protection to life, liberty, and property; and property means and includes money due for the violation of a contract. (Steed v. Harvey, 789.)

3. CONSTITUTIONS—MANDATORY AND DIRECTORY PROVISIONS—CONSTRUCTION.—All provisions of a constitution should be understood and accepted as mandatory, unless it is unmistakably manifest upon their face that they were intended to be directory. Rules which distinguish mandatory and directory statutes should rarely, if ever, be applied to the provisions of a constitution. (Sjoberg v. Security Sav. etc. Assn., 616.)

4. CONSTITUTIONAL LAW—PLACE OF TRIAL.—A state constitutional provision that "all civil and criminal business arising in any county must be tried in such county, unless a change of venue is taken in such cases as may be provided by law," applies only to causes of action arising within the jurisdiction of the state. (Steed v. Harvey, 789.)

5. CONSTITUTIONAL LAW—RIGHTS OF CITIZENS OF OTHER STATES.—The provision of the federal constitution that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states" gives a citizen of a state the right to maintain an action to recover a legal demand or equitable right against a person found in a state of which he is not a citizen. (Steed v. Harvey, 789.)

6. TAXES—PRIVILEGES OR OCCUPATIONS—CONSTITUTIONAL PROVISIONS AS TO EQUALITY AND UNIFORMITY—APPLICATION OF.—Constitutional provisions that "all taxes levied

on property in this state shall be assessed in exact proportion to the value of such property," and that "the property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate," relate only to direct taxes on property. These provisions of equality and uniformity in the taxation of property alone do not apply to taxation on privileges or occupations. (*Phoenix Carpet Co. v. State*, 143.)

7. JUDGMENT VOID FOR WANT OF JURISDICTION.—THE "FULL FAITH AND CREDIT" CLAUSE of the federal constitution applies only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and does not preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter. It does not apply to a judgment in proceedings to garnish a debt due to a nonresident creditor, which is void because there was no personal service on the defendant within the state, or a voluntary appearance by him. (*Louisville etc. R. R. Co. v. Nash*, 181.)

CONTRACTORS.

See Negligence, 8-11.

CONTRACTS.

1. CONTRACTS—FAILURE TO FOLLOW STATUTE—GOOD AS COMMON-LAW OBLIGATIONS.—Bonds or undertakings intended to be given in compliance with statutes, although having failed in substantial compliance therewith, will, if entered into voluntarily by competent parties, for a lawful purpose, and founded upon a sufficient consideration, constitute valid contracts at common law. (*Portland v. Bituminous Pav. Co.*, 713.)

2. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS.—The legislature has no constitutional power to limit the taxing power of a municipality so as to prevent it from raising the amount necessary to pay its pre-existing valid obligations. (*Hammond v. Place*, 543.)

3. CONTRACTS—LAW OF PLACE.—As a general rule, a contract is governed, as to its nature, obligation, validity, and interpretation, by the law of the place where it is made, unless the parties have in view some other law, or unless it is to be wholly performed in some other place, in which case the law of place of performance, or the law which both parties had in view, must govern. (*Southern Ry. Co. v. Harrison*, 936.)

4. CONTRACTS—NOVATION.—The plea of novation of contract admits the debt sued on and casts upon the opposition the burden of proving the state of facts necessary to show its extinguishment. (*Studebaker Bros. Mfg. Co. v. Endom*, 489.)

5. CONTRACTS—NOVATION.—To constitute the contract of novation, in the essential point of the extinguishment of the original obligation, there must be shown the consent of both of the contracting parties, and the mere intention of the obligor that the pre-existing debt shall be discharged does not suffice. The creditor must concur in this. (*Studebaker Bros. Mfg. Co. v. Endom*, 489.)

6. CONTRACTS.—NOVATION OF CONTRACT IS NEVER PRESUMED, and the intention to make it must clearly result from the terms of the agreement, or by a full discharge of the original debt. A mere modification will not do, and anything remaining of the original obligation prevents novation. (*Studebaker Bros. Mfg. Co. v. Endom*, 489.)

7. **CONTRACTS—PAROL EVIDENCE TO EXPLAIN.**—Parol evidence is admissible to explain a mere memorandum of a written contract. (*Steed v. Harvey*, 789.)

8. **PUBLIC CONTRACTS — INTERPRETATION — STREET IMPROVEMENTS.**—Where a municipal ordinance governing the letting of contracts for street improvements requires the contractor to give, in the first place, a bond in a sum equal to the contract price conditioned upon his completing the improvement proposed according to the specifications, and, in the next place, a bond in a sum equal to twenty-five per cent of the contract price, conditioned that the contractor shall, for five years after the completion of the improvement, keep the pavement in repair of defects arising from defective materials or workmanship, the evident intent of the ordinance is to make the two bonds serve separate and distinct purposes, and a bond conditioned according to the second requirement of the ordinance cannot stand as security for the faithful performance of the principal contract, but must stand solely as security for the performance of the contract to repair. (*Portland v. Bituminous Pav. Co.*, 713.)

9. **CONTRACTS—PUBLIC POLICY.**—Where the creditors of an insolvent estate have joined in a proceeding in their common interest as creditors, a contract whereby one of them seeks to obtain a secret advantage over the others is void as against public policy. (*Vreeland v. Turner*, 562.)

10. **CONTRACTS IN RESTRAINT OF TRADE.**—A contract between a railroad and a telegraph corporation to which the former has granted the exclusive right of way over and along its line of road, that it will not transport men or material for the construction, maintenance, or operation of a competing line of poles and wires, except at and for the railroad company's local rates, nor furnish for any competing line any facilities or assistance, or stop its trains to distribute any material at any other than regular stations, if it can lawfully withhold doing these things, is in restraint of trade, contrary to public policy and void. (*Cumberland etc. Co. v. Morgan's etc. R. R. Co.*, 442.)

See Corporations, 2, 8, 24; Husband and Wife, 8; Judgments, 2; Marriage and Divorce, 1; Master and Servant, 1, 8, 11; Mechanics' Liens, 8; Municipal Corporations, 5, 23, 24; Negligence, 85; Real Property, 8; Specific Performance; Vendor and Purchaser.

CONVERSION.

See Municipal Corporations, 8.

CORPORATIONS.

1. **CORPORATIONS—ARTICLES OF INCORPORATION—VALIDITY.**—If a corporation organizes under a general act, and inserts in its articles of incorporation regulations and provisions additional to those required by the creative statute, such additional regulations and provisions are void. (*Indiana Bond Co. v. Ogle*, 828.)

2. **CORPORATIONS—CONTRACTS ULTRA VIRES OF—WHEN CANNOT BECOME BINDING.**—Where a contract is ultra vires in the proper sense, being of a sort into which the corporation absolutely lacks the power to enter, it cannot be ratified or become valid by acquiescence; nor can the corporation be bound by such contract upon the ground of estoppel arising from the receipt of benefits. Such a contract is void, and no action can be sustained upon it. (*National Loan etc. Assn. v. Home Sav. Bank*, 245.)

3. CORPORATIONS—CONTRACTS ULTRA VIRES OF—WHEN MAY BIND.—Where an act or contract is ultra vires, not for want of power in the corporation, but for want of power in the agent or officer consummating it, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may become binding upon the corporation by ratification, consent, or acquiescence, or by the corporation receiving benefits under the act or contract. (National Loan etc. Assn. v. Home Sav. Bank, 245.)

4. CORPORATIONS—CREATION FOR PARTICULAR PURPOSE.—A statute providing for the creation of corporations "for the purpose of buying and selling merchandise and conducting mercantile operations" does not authorize the creation of a corporation to buy and sell bonds. The term "merchandise" does not include bonds. (Indiana Bond Co. v. Ogle, 326.)

5. CORPORATIONS—CREATION FOR PARTICULAR PURPOSE.—If a corporation claims the right to exist for a certain purpose, it must show that it was organized under a statute authorizing the creation of corporations for that particular purpose. (Indiana Bond Co. v. Ogle, 326.)

6. CORPORATIONS—DE FACTO—NUL TIEL CORPORATION.—If there is no grant of power for the creation of the corporation pretended to be organized, there can be no de facto corporation; and, in a suit by such pretended corporation upon a contract executed by it, the other party to the contract is not estopped to deny the corporate existence at the date of the contract. (Indiana Bond Co. v. Ogle, 326.)

7. CORPORATIONS—DIRECTORS, ELECTION OF—EFFECT OF VOTING FOR INELIGIBLE PERSON.—Votes cast for a person not eligible to the office of director in a corporation cannot elect him, and he does not become even a de facto director and may be ousted by legal proceedings; but votes cast for him cannot be ignored so as to elect another candidate who has received a minority of the votes cast unless those voting for the former know the facts which make him ineligible to office and that such facts render him so. (Schmidt v. Mitchell, 427.)

8. CORPORATIONS—DIRECTORS—ELIGIBILITY OF EXECUTOR.—Although directors in a corporation are required by law to be stockholders therein, an executor who has the right to vote stock owned by his testator is eligible to the office of director. (Schmidt v. Mitchell, 427.)

9. CORPORATIONS — DISSOLUTION — WHEN NOT AFFECTED.—Neither insolvency nor the appointment of a receiver for a corporation amounts to a dissolution, or relieves it from the duty of paying its debts. (Jackson v. McInnis, 755.)

10. CORPORATIONS—DUTY OF PERSONS DEALING WITH. A person dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their scope, and cannot plead ignorance in avoidance of the defense of ultra vires. (National Loan etc. Assn. v. Home Sav. Bank, 245.)

11. CORPORATIONS—ENGAGING IN BUSINESS NOT AUTHORIZED BY CHARTER—CONTROLLING ANOTHER CORPORATION.—If one corporation takes possession of and manages the affairs of another, it thereby engages in a business other than that authorized by its charter, and such transaction is opposed to public policy and void. (State v. Newnan, 476.)

12. CORPORATIONS — EQUITABLE OWNERSHIP.—The legal title to the property of a corporation is in the corporation it-

self, and not in its shareholders, but in equity the shareholders of private business corporations, where there are no creditors or others interested, are regarded as the equitable or beneficial owners of the corporate property. (*First Nat. Bank of Gadsden v. Winchester*, 904.)

13. CORPORATIONS—EXECUTORS, RIGHT TO VOTE STOCK—REVOCATION OF PROXY.—The executors of an estate have the right to vote the corporate stock of their ancestor, and, if one of the executors is present and votes the stock of the estate at a stockholders' meeting, this is a revocation of a proxy to vote such stock given by his coexecutor to a third person. (*Schmidt v. Mitchell*, 427.)

14. CORPORATIONS.—IMPLIED POWERS in corporations are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted and to accomplish the purpose of their creation. (*State v. Newman*, 476.)

15. CORPORATIONS.—AN INCIDENTAL CORPORATE POWER is one directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it. (*State v. Newman*, 476.)

16. CORPORATIONS—MANNER OF ELECTING DIRECTORS. Under a state constitutional provision for the election of directors in corporations by a cumulative system of voting, stockholders are entitled to vote under the mode prevailing before the adoption of the constitution, if they so desire, and an election of directors under such other mode is legal if no stockholder claims, or is denied, the right to vote under the cumulative system. (*Schmidt v. Mitchell*, 427.)

17. CORPORATIONS—MORTGAGE OF SAME PROPERTY BY SOLE EQUITABLE OWNERS AND CORPORATION—PRIORITY. When a private business corporation, free from debt, is reduced to two stockholders, who buy out the other stockholders, they have the equitable ownership of the corporate property, and may mortgage it to secure their individual debt for the purchase money. Such a conveyance, though it is also executed by the corporation, passes their interest against the equitable demands of subsequent encumbrancers or purchasers, with notice, from the corporation, and is, therefore, superior to a subsequent mortgage given by the corporation itself on the same property. (*First Nat. Bank of Gadsden v. Winchester*, 904.)

18. CORPORATIONS—POWERS—SCOPE OF.—A corporation has no natural rights or capacities such as an individual or a partnership, and, if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter of the corporation. (*National Loan etc. Assn. v. Home Sav. Bank*, 245.)

19. CORPORATIONS — PROPERTY — CONCENTRATION OF OWNERSHIP.—When a corporation ceases to be an association of persons by the concentration of its stock into the hands of one owner, the corporation is not thereby dissolved, nor does the sole stockholder thereby become the legal owner of the property. The corporate body, when reduced to one stockholder, is merely in abeyance, ready to resume active functions whenever, by the sole owner's transfer of shares to others, the corporation again becomes a body aggregate. (*First Nat. Bank of Gadsden v. Winchester*, 904.)

20. CORPORATIONS—PROXY TO VOTE STOCK—REVOCATION.—A proxy to vote corporate stock is always revocable, even when, by its terms, it is made irrevocable, nor is it necessary that it should be revoked in the exact manner provided in the instrument exacting the proxy. (*Schmidt v. Mitchell*, 427.)

21. CORPORATIONS—RIGHT TO ACQUIRE STOCK—IMPERFECT OWNERSHIP.—Although, under some circumstances, one corporation may lawfully acquire holdings of stock in another, such holdings do not partake of the fullness of perfect ownership, but constitute an imperfect ownership, only giving the right of enjoyment and disposition of the property when that can be done without injuring the rights of others. (*State v. Newman*, 476.)

22. CORPORATIONS—RIGHT TO ACQUIRE AND VOTE STOCK.—Under circumstances tolerating it, one corporation, not possessing the express or necessarily implied power to acquire stock in another, may do so and collect dividends thereon and dispose of it, and yet it does not have the power to vote the stock at elections for officials to govern and manage the affairs of the other corporation. (*State v. Newman*, 476.)

23. CORPORATIONS — SUCCESSOR—POWERS.—One corporation, as the successor of another corporation, can exercise only such powers as are conferred by legislative grant, either in express terms or by necessary implication, upon the latter corporation. (*State v. Newman*, 476.)

24. CORPORATIONS — ULTRA VIRES CONTRACT OF SURETYSHIP.—Ultra vires executory contracts of corporations are void. Hence, if a contract of suretyship is not within the charter powers of a corporation, a mortgage executed by it to secure notes made by its stockholders, of which there are only two, imposes no enforceable personal obligation upon the corporation, and the mortgage does not divest the corporate entity of its legal title to the property it purports to convey. (*First Nat. Bank of Gadsden v. Winchester*, 904.)

See Estoppel, 2, 4; Husband and Wife, 12; Negotiable Instruments, 4; Receivers, 6; Taxes, 2-4.

COSTS.

1. COSTS IN ACTIONS TO ENFORCE TRUSTS, if allowed against the trustees, are payable out of the trust fund, unless the court otherwise directs because of bad faith on the part of such trustees. (*Estate of Cole*, 854.)

2. COSTS—OFFICERS' LIABILITY.—Upon the recovery of judgment against public officers in a taxpayers' suit, restraining such officers from paying out public money and compelling the repayment of moneys already paid out, the defendants are liable for the costs of suit. (*Webster v. Douglas County*, 870.)

COTENANCY.

1. COTENANCY—DEMAND FOR POSSESSION.—The commencement of an action of ejectment by one cotenant against another, who has excluded him from possession of the premises, is a sufficient demand to be let into possession. (*Fenton v. Miller*, 502.)

2. COTENANCY — PARTITION — ACCOUNTING — INSURANCE.—A cotenant in possession is not entitled, upon partition, to be allowed for insurance paid by him, when such insurance did not inure to the benefit of the excluded tenant. (*Fenton v. Miller*, 502.)

3. COTENANCY — PARTITION — ACCOUNTING — LIMITATIONS.—If, in partition proceedings between cotenants, the one who has had exclusive possession for a number of years, asks credit for improvements made during that time, he cannot have the statute of limitations applied against the excluded tenant's right to an al-

lowance for use and occupation during the same time. (*Fenton v. Miller*, 502.)

4. COTENANCY—PARTITION—ACCOUNTING—RENTS AND IMPROVEMENTS.—If, in proceedings in partition between cotenants, one has been in exclusive possession for a number of years, and made valuable improvements, and the excluded tenant is to be allowed for rental, the improvements should be charged at cost, as against the charge for rental, when the expenditure for improvements was a disbursement in order to make the premises rentable at the price charged in the accounting. (*Fenton v. Miller*, 502.)

5. COTENANCY — PARTITION — ALLOWANCE AGAINST WIDOW FOR USE AND OCCUPATION.—The widow of a deceased cotenant, who, after his death, holds the entire premises adversely to her cotenant is liable to him in partition proceedings for the rental value of his undivided interest, notwithstanding her homestead and dower rights in the undivided interest which belonged to her husband. (*Fenton v. Miller*, 502.)

6. COTENANCY—PARTITION—IMPROVEMENTS.—A cotenant who makes substantial improvements on the common property is entitled, upon the sale of the property in partition, to have such improvements considered in determining what is a just division of the proceeds. (*Fenton v. Miller*, 502.)

7. COTENANCY — USE AND OCCUPATION — ALLOWANCE FOR ON PARTITION.—To justify a recovery under a statute limiting recovery against a cotenant to moneys actually received by the tenant in possession in excess of his just proportion of the rents and profits, he must have actually received such rents and profits. His exclusive occupancy is not enough to create liability; but the statute does not impair the right of the tenant against whom the premises have been held adversely to have an allowance made on partition for the value of the use and occupancy. (*Fenton v. Miller*, 502.)

COVENANTS.

1. COVENANTS AGAINST ENCUMBRANCES contained in a deed are broken by the existence of an outstanding term in the lands, and an action for the breach thereof may be maintained, although the existence of such term is known to the grantee when he accepts the conveyance. (*Demars v. Koehler*, 642.)

2. COVENANTS AGAINST ENCUMBRANCES.—A right of action on a covenant against encumbrances arises upon the existence of the encumbrance irrespective of any knowledge on the part of the grantee, or of any eviction of him, or of any actual injury it has caused him, so that if he has not paid off or bought in the encumbrance he is entitled at least to nominal damages. (*Demars v. Koehler*, 642.)

CREDITOR'S SUIT.

CREDITOR'S SUIT.—A JUDGMENT THAT IS MERELY IRREGULAR, and not absolutely void, is a sufficient foundation for a bill in aid of execution. (*Griffin v. McGalvin*, 564.)

CROPS.

CROPS—MORTGAGED PREMISES—CROPS THEREON, TITLE TO.—If the owner of land mortgages and subsequently leases it, the lessee, who sows a crop before the expiration of the time for redemption under a foreclosure sale of the premises, and remains in possession after such sale, and cares for the crop, harvests it, and carries it off the premises in about a week after the redemption period has expired, and before there has been any en-

try upon the premises by the purchaser at the sale, has, as against such purchaser, a superior right to the crop. (*Aultman & Taylor Co. v. O'Dowd*, 603.)

See Executions, 1; Trover, 1.

CUSTOM.

CUSTOM—OPERATION OF—KNOWLEDGE.—A local custom, even if valid, is operative only in respect to those who are shown to have knowledge of it. (*Baxter v. Sherman*, 631.)

See Agency, 4.

DAMAGES.

1. DAMAGES — AWARD OF — EXPLANATORY INSTRUCTIONS.—In case it be supposed or feared that the jury does not understand a charge respecting an award of damages, or may be misled by it to an unbridled and capricious assessment, an explanatory instruction should be requested. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

2. DAMAGES FOR DEATH—RIGHT OF ACTION.—The right to maintain an action for damages on account of the death of a human being is entirely statutory, and before a person can recover such damages he must bring himself clearly within the terms of the statute. (*Citizens' Street Ry. Co. v. Cooper*, 319.)

3. DAMAGES FOR FALSE REPRESENTATIONS.—In an action to recover for false representations, whereby a person is induced to enter into a contract with another to cut and haul timber on the lands of the latter, wherein the plaintiff waives the tort and seeks to recover on an implied contract, he is entitled to recover only the amount which the defendant has been enriched or benefited by his false representations, and he cannot recover as damages his prospective profits resulting if the facts had been as represented. (*Huganir v. Cotter*, 884.)

4. DAMAGES—MEASURE OF, IN ACTIONS FOR PERSONAL INJURIES.—In cases of actions for personal injuries, where the recovery must be rested upon the wanton or willful misconduct of the defendant's employes, and the damages may be punitive as well as compensatory in character, and where compensatory damages are claimed for physical and mental pain and suffering, the plaintiff, if he is entitled to recover at all, may be awarded such damages as the jury see proper to assess, not in excess of the amount claimed in the complaint. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

5. DAMAGES, SPECIAL—PLEADING.—If special damages are claimed, they must be specifically alleged. (*Williams v. Oregon Short Line R. R. Co.*, 777.)

See Master and Servant, 11; Negligence, 5, 7, 15, 35; Parent and Child; Trespass, 3; Trial, 5; Waters and Watercourses, 15.

DEBT.

See Attachment, 3, 5-7.

DEBTOR AND CREDITOR.

1. DEBTOR AND CREDITOR — INSOLVENCY — MARSHALING ASSETS.—A person holding a judgment note of a merchant in failing circumstances, which is secured by mortgage on land, may obtain judgment by confession and levy on the debtor's stock of goods, and, upon subsequent voluntary assignment proceedings, he is entitled to be protected in his rights without requiring him to first resort to foreclosure. (*Friedlander v. Fenton*, 207.)

2. DEBTOR AND CREDITOR—MARSHALING ASSETS.—Although a person has a lien or interest in two funds and another has a lien on only one of such funds, the former cannot be compelled to first resort to the fund in which he has the sole interest, when such action operates to his prejudice. (*Friedlander v. Fenton*, 207.)

3. DEBTOR AND CREDITOR—MARSHALING SECURITIES—SUBROGATION.—Where a prior encumbrancer of two funds, by his election of remedies, deprives a junior encumbrancer, who has a lien upon one of the funds only, from reaching that particular fund, the junior encumbrancer, to the extent of his lien, should be substituted to the lien of the paramount encumbrancer upon the other fund, as against the debtor and all claiming under him by lien or title subsequent in time. (*Wyman v. Port Dearborn Nat. Bank*, 259.)

4. DEBTOR AND CREDITOR—VOLUNTARY ASSIGNMENTS.—JUDGMENT NOTES intended to create a preference in contemplation of a voluntary assignment for the benefit of creditors, executed contemporaneously with the deed of assignment and as part of the same transaction, are void. (*Friedlander v. Fenton*, 207.)

See Attachment, 4.

DEEDS.

1. DEEDS—CONSIDERATION—EFFECT OF ERASURES.—A deed made under a statute requiring a valuable consideration to support it, but from which considerations first inserted have been wholly erased, and such erasures not explained, leaving it wholly without any expressed consideration, is not sufficient foundation for a claim of title. (*Catlin Coal Co. v. Lloyd*, 216.)

2. DEEDS—INTERLINEATIONS OR ERASURES—BURDEN OF PROOF.—An alteration or interlineation in a deed or other instrument must be explained by the party claiming the benefit of the paper, and if it is suspicious in appearance, and a satisfactory explanation is not made, the proper conclusion is against the instrument. (*Catlin Coal Co. v. Lloyd*, 216.)

3. DEEDS—INTERLINEATIONS OR ERASURES—PRESUMPTION.—The mere fact of an interlineation or an erasure appearing in a deed or other instrument does not, of itself, raise any presumption of law either for or against the validity of the writing, and the question when, by whom, and with what intent it was made is one of fact to be submitted to the jury. (*Catlin Coal Co. v. Lloyd*, 216.)

See Equity, 1; Evidence, 2; Mandamus, 1; Trusts, 3.

DEFINITIONS.

"False pretense." (*State v. Renick*, 753.)

"Negligence." (*Lillibridge v. McCann*, 553.)

DERELICTION.

See Waters and Watercourses, 3-5.

DUE PROCESS OF LAW.

See Attachments, 8; Statutes, 11.

EASEMENTS.

SERVITUDES—TELEPHONE LINE IN HIGHWAY.—The right to erect poles and place wires and other fixtures for telephonic purposes along a public street or highway, wherein the fee of the

land belongs to private persons, imposes an additional servitude, and can be acquired against the consent of such persons only under the power of eminent domain. (Nicoll v. New York etc. Tel. Co., 666.)

EJECTMENT.

1. EJECTMENT—DEFENSE OF TITLE IN THIRD PERSON—ESTOPPEL.—In ejectment, a defendant, holding under a land contract made by plaintiff and conditioned that defendant should pay all taxes upon the land, is estopped to set up title in a third party acquired at a tax sale upon defendant's default in the payment of taxes. (Hubbard v. Shepard, 548.)

2. EJECTMENT—ESTOPPEL—TITLE IN THIRD PERSON—HUSBAND AND WIFE.—The estoppel of a defendant in ejectment to set up title in a third party obtained through the default of the defendant in performing the conditions of her land contract with the plaintiff, under which she holds, is binding with equal force upon her husband, joined with her as codefendant, whose possession is in the right of his wife. (Hubbard v. Shepard, 548.)

See Pleading, 5; Trespass, 1.

ELECTIONS.

See Corporations, 7, 16.

ELECTRIC COMPANIES.

1. ELECTRIC COMPANIES—DUTIES OF.—While electric companies are not bound to have perfect apparatus or construction, yet where their wires are designed to carry strong and powerful currents of electricity, so that persons coming in contact with them must be seriously injured, or killed, it is the duty of such companies to exercise the utmost care to prevent such injury, and whether this duty has been performed in a given case is ordinarily for the jury. (Perham v. Portland Electric Co., 730.)

2. ELECTRIC COMPANIES.—IMPERFECT INSULATION OF ELECTRIC WIRES acts as an invitation to persons working among them to risk the consequences of contact with them. (Perham v. Portland Electric Co., 730.)

ELECTRIC WIRES.

See Negligence, 12, 17, 18.

EMINENT DOMAIN.

EMINENT DOMAIN—CONSTRUCTION OF STATUTE.—Under the New Jersey eminent domain statute, it is not absolutely necessary to the jurisdiction of the court to which an appeal from an award has been taken that the appellant should, within ten days after filing the petition of appeal, give written notice thereof to the opposite party as required by the statute. Such requirement is directory and not mandatory. (Nicoll v. New York etc. Tel. Co., 666.)

ENCUMBRANCES.

See Covenants, 1, 2; Sheriffs, 5.

ENTIRETIES.

See Husband and Wife, 13; Trover, 1.

EQUAL PROTECTION.

See Constitutions, 2.

EQUITY.

1. **EQUITY—DEED GIVEN IN CONSIDERATION OF COMPOUNDING A FELONY.**—If a married woman makes a deed of her separate estate, in consideration that the grantee will suppress a pending prosecution against her husband for a felony, a court of equity will not cancel it for illegality of consideration. (*Treadwell v. Tobert*, 918.)

2. **EQUITY — DIRECTION OF ISSUE — DISCRETION.**—The direction of an issue out of chancery is a matter of sound discretion; and when the court has used its discretion, and gone on without an issue, it cannot be reversed for an omission to direct one, where no issue was asked. (*West Virginia Bldg. Co. v. Saucer*, 822.)

3. **EQUITY—JURISDICTION—ENJOINING EXECUTION OF VOID JUDGMENT.**—A court of equity has plenary power, and ought to enjoin the enforcement of a judgment at law, based upon an officer's false return of service of process. (*Huntington v. Crouter*, 726.)

4. **EQUITY—PARTIES IN PARI DELICTO.**—The law leaves all who share in the guilt of an illegal or immoral transaction where it finds them. It will neither lend its aid to enforce contracts, while executory, forming part of the transaction; nor will it undo or rescind such contracts when executed. (*Treadwell v. Torbert*, 918.)

5. **EQUITY PRACTICE—AMENDMENT OF BILL.**—The averment of extrinsic facts to reform a deed is amendable, if the facts warrant the amendment, and, upon a motion to dismiss, for want of equity, the amendment must be considered as made. (*Greene v. Dickson*, 920.)

6. **EQUITY — REFORMATION OF DEED — REMEDY AT LAW.**—The fact that a defect in a deed is of such a character that it may be aided by parol, and thereby be made available in defense to a suit at law, does not take away the jurisdiction of equity to reform it. (*Greene v. Dickson*, 920.)

7. **EQUITY — REFORMATION OF DESCRIPTION IN A DEED.**—Although a deed may be void on its face for want of a definite description of the land, a court of equity will reform it upon proper allegations and proof of extrinsic facts; as, where lands are described as "part" of a quarter section named, containing eighty-eight acres, but no particular eighty-eight acres of the one hundred and sixty acres is specified or pointed out. (*Greene v. Dickson*, 920.)

8. **EQUITY — REFORMATION OF WRITTEN INSTRUMENTS.**—Courts of equity alone have jurisdiction to reform written instruments, and will always grant relief upon a proper bill, supported by insufficient proof. (*Greene v. Dickson*, 920.)

9. **EQUITY — REFORMATION OF WRITTEN INSTRUMENTS, WHEN PROPER.**—So long as a party who holds under a written instrument is dependent upon parol testimony to supply its defects, and is exposed to the hazard of losing the benefit of his written muniment by the loss of such parol evidence, he is entitled to the aid of a court of equity, to perfect the written muniment. (*Greene v. Dickson*, 920.)

10. **EQUITY—RELIEF FROM JUDGMENT AT LAW—ACCIDENT—DEATH OF JUSTICE OF THE PEACE.**—When a justice of the peace renders a judgment against a defendant, who applies for a copy of the record, on which to base a writ of certiorari, but the justice sickens and dies without furnishing a copy of the bill of exceptions, and his successor cannot find it, though the docket states that such a bill was signed, the defendant's recourse to a

certiorari is blocked, for his case depends on the showing of the bill. The case is clearly one of "accident," whether the bill was unsigned, or signed and lost, the defendant, in either case, being deprived of the benefit of his writ, and equity, therefore, has jurisdiction to give relief by enjoining the judgment; but there must be a good ground for a certiorari, as the accident, alone, would not justify the intervention of equity. (*Grafton etc. R. R. Co. v. Davisson*, 799.)

11. EQUITY—RELIEF FROM JUDGMENT AT LAW—INJUNCTION—ACCIDENT—PROPER PRACTICE.—When a judgment at law is enjoined in equity, on the ground of "accident," the court must not at once set aside the judgment and grant a new trial, when it determines that a retrial should be had; but, having the parties before it in an independent cause, the proper practice is to direct an issue or issues to be tried at its bar, and, upon the result of the trial, to perpetuate or dissolve the injunction, in whole or in part. The judgment ought to stand as security until it is finally determined whether it shall be perpetually enjoined or not, and, in the meantime, the court should let the injunction stand. (*Grafton etc. R. R. Co. v. Davisson*, 799.)

12. EQUITY—RELIEF FROM JUDGMENT AT LAW—PRACTICE.—A court of equity, when called upon for relief from a judgment at law, does not set aside the verdict and judgment, and order the case to be remanded to the law court for a new trial, when it determines that a retrial should be had. (*Grafton etc. R. R. Co. v. Davisson*, 799.)

See Corporations, 12; Judgments, 13; Trusts, 7.

ESCAPE.

See Officers, 4-9.

ESTATES.

ESTATES—POSSESSION OF SURFACE DOES NOT CONSTITUTE POSSESSION OF MINERALS UNDERNEATH IF SEVERED.—If the title to the surface of land has been severed from the title to coal and mineral underneath, in place, the possession of the surface does not carry with it the possession of such coal and mineral. (*Catlin Coal Co. v. Lloyd*, 216.)

ESTATES OF DECEDENTS.

See Attachments, 4; Husband and Wife, 8.

ESTOPPEL.

1. ESTOPPEL—DOCTRINE OF—BASIS.—The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which, by his own conduct, he has induced another to believe do not exist. (*Hubbard v. Shepard*, 548.)

2. ESTOPPEL IN FAIS—ACQUIRING EQUITABLE INTEREST IN CORPORATE PROPERTY BY—ILLUSTRATION.—If the directors of a corporation, who own all of its capital stock, prepare a deed conveying its entire property, and send it for execution to one who has been acting as president of the company, all of such directors, after the deed has been so executed and returned to them, and possession of the property conveyed has been delivered to the grantee, are equitably estopped by their act and conduct from attacking the deed on the ground that it was executed without authority by one who had usurped the office of president of the company. (*Hoene v. Pollak*, 189.)

3. ESTOPPEL IN PAIS—ACQUIRING EQUITABLE INTEREST IN LANDS BY.—Notwithstanding the requirements of the statute of frauds, declaring void certain contracts for the sale of land, unless evidenced by writing, subscribed by the party to be charged, an equitable interest may be acquired in lands, without any written transfer of title, by the conduct or declaration of the owner which would create an equitable estoppel in pais on his part; and this rule applies to corporations as well as to natural persons. (*Hoene v. Pollak*, 189.)

4. ESTOPPEL IN PAIS—ACQUIRING EQUITABLE INTEREST IN LANDS BY—CORPORATIONS.—Although an agent of a corporation, authorized to sell land, or any interest in land, can convey no legal title or freehold estate without he has authority in writing to sell, yet the directors or governing body of the corporation may so act as to estop themselves from denying the existence of such written authority, and thus create an equitable estoppel in pais. (*Hoene v. Pollak*, 189.)

5. ESTOPPEL—PLEADING IRREGULARITY OF BOND.—Where an obligor has obtained and availed himself of the benefits to be derived from the execution of a bond, neither he nor his sureties can defeat their liability because of some irregularity in the proceeding in which the bond originated. They are estopped to set up such a defense. (*Portland v. Bituminous Pav. Co.*, 713.)

See Ejectment, 1, 2; Sales, 2; Suretyship, 2.

EVIDENCE.

1. EVIDENCE—DECLARATIONS OF INFANT.—If an infant becomes a party to a suit, the same species of evidence is received against him as though he were an adult, and the mere fact that he does not understand the nature of an oath does not authorize the rejection of declarations made by him against his interest, but they should be cautiously received and their effect left to the jury to determine. (*Atchison etc. Ry. Co. v. Potter*, 385.)

2. EVIDENCE—DEEDS, AIDING BY PAROL.—A deed describing land conveyed as one acre, "on which the schoolhouse is to be built," and more particularly described as part of a specified forty-acre tract, is not void for want of a sufficient description. Parol evidence is admissible to identify the land conveyed. (*Cottingham v. Hill*, 923.)

3. EVIDENCE — DENIAL OF OWNERSHIP — EFFECT AGAINST GRANTEE.—Declarations of a former owner of land disclaiming title to an accretion to it are not admissible in evidence to defeat his grantor's claim to such accretion. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

4. EVIDENCE—OPINIONS.—A witness who is not shown to know anything about the time or distance within which a railroad train could be stopped, under any circumstances or conditions, is not competent, in an action against a railway company for personal injuries caused by its train, to give his opinion as to the distance within which the train could have been stopped at the time of the injuries. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

5. EVIDENCE—PRODUCTION OF WITNESSES.—If counsel offers to prove certain facts, the court may require that the witnesses be sworn and put upon the stand, so that the admission of questions and answers may be ruled upon. (*Lisonbee v. Monroe Irr. Co.*, 784.)

6. RECEIPTS—EXPLANATION BY PAROL.—Where, in assumpsit for services as an architect, defendant puts in evidence a written receipt in full given him by plaintiff, and there is a clear conflict in the evidence as to the circumstances under which, and the

reasons for which, the receipt was given, the plaintiff claiming that in view of such circumstances and reasons, the receipt should be denied effect as such, the question becomes one for the jury to determine. (*Chapel v. Clark*, 587.)

7. EVIDENCE—ADMISSIBILITY OF RECORD TO PROVE COLLATERAL MATTER.—In an action to recover money lost while in the custody of a safe deposit company, a foreign decree of distribution in favor of the depositor is admissible in evidence to show that he had the amount of money he claims to have lost. (*Mayer v. Brensinger*, 106.)

See Appeal, 69; Contracts, 7; Executors and Administrators, 8; Fraudulent Conveyances, 3; Husband and Wife, 5-7; Insurance, 8; Judges; Negligence, 19; Negotiable Instruments, 7; Process; Replevin, 4; Sheriffs, 7; Trespass, 2; Trial, 4-6.

EXECUTIONS.

1. EXECUTION.—A CROP raised on land held by a husband and wife by entireties is held by them in the same manner and subject to the same law as the land itself, and such crop is therefore not subject to levy and sale on an execution against the husband. (*Dickey v. Converse*, 568.)

2. EXECUTION — SALARY OF PUBLIC OFFICER AFTER EXPIRATION OF HIS TERM.—Creditors of a public officer cannot intercept his salary by legal process. Hence, the salary of a building inspector cannot be reached by proceedings supplementary to execution for the satisfaction of a judgment, though such proceedings are not commenced until after his term has expired and he has ceased to be an officer. (*Orme v. Kingsley*, 614.)

3. EXECUTIONS — SUPPLEMENTARY PROCEEDINGS.—An executor is required to answer in a county to which he has removed since judgment was obtained against him, in proceedings supplementary to execution, issued by the court of another county, as to funds in his hands belonging to a legatee who is the judgment debtor. (*Murphy v. Busick*, 304.)

4. EXECUTION — SUPPLEMENTARY PROCEEDINGS AGAINST WIFE — EXAMINATION WITHOUT HUSBAND'S CONSENT.—A statute providing that a wife shall not be examined for or against her husband without his consent does not shield the wife of a judgment debtor in proceedings supplementary to execution, brought against her to discover whether she has property belonging to him in her possession, and she may therefore be examined therein without his consent. (*Frankenthal v. Solomon*, 116.)

5. EXECUTIONS — SUPPLEMENTARY PROCEEDINGS — PLEADINGS.—A complaint in supplementary proceedings to reach a legacy of the judgment debtor in the hands of an executor is not bad for failing to allege that the estate is solvent, and that a year has elapsed since the issuance of letters of administration. These facts are matters of defense. (*Murphy v. Busick*, 304.)

6. EXECUTIONS—VARIANCE.—An execution issued on a judgment by confession in vacation, correctly describing the judgment and its date, but reciting that such judgment was recovered at a former term of court, is not void for variance, if such recital is a clerical error and may be regarded as surplusage. (*Friedlander v. Fenton*, 207.) See Warehousemen, 8.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS — DEVASTAVIT—LIABILITY OF THOSE WHO TAKE ADVANTAGE OF, WITH KNOWLEDGE.—Whenever an executor or administrator violates his trust, and another person, takes advantage of the devastavit

knowing that the personal representative is not proceeding according to the requirements of the law, or the terms of the will under which he was appointed, such complicity authorizes those interested in the estate to hold such third party answerable. (*Brewer v. Hutton*, 804.)

2. ESTATES OF DECEDENTS—EXEMPTION FROM ADMINISTRATION IN FAVOR OF WIDOW AND MINOR CHILDREN.—When a statute grants an exemption of personal property from administration and the payment of debts, in favor of the widow and "minor" children of a decedent, it is minority—the condition of being under the age of twenty-one years—and that alone, without regard to any other condition or relation, upon which the right of a child to share in the exemption depends. Hence, a daughter, though married and over eighteen years of age, is entitled to share in the exemption, where she is under twenty-one years of age. (*Lanford v. Lee*, 914.)

3. EXECUTORS AND ADMINISTRATORS—EVIDENCE OF JURISDICTION.—The issuance of letters of administration is *prima facie* evidence that the court issuing them had jurisdiction over the subject matter of the estate. (*Thompson v. Burge*, 369.)

4. EXEMPTION FROM ADMINISTRATION—EXISTENCE OF FAMILY RELATION.—Under a statute which grants an exemption of personal property from administration and the payment of debts, in favor of the widow and minor children of a decedent, she and they are entitled to the exemption, not as incident to the social relation of a family, but because of the status of widowhood and minority, and they are entitled to take and hold it, in the condition in which they are found, whether they are living together in such relation or not. The right to the exemption is not lost because the social relation of a family does not exist. If that relation has been dissolved by a child "leaving the family," such child takes, in severalty, its share of the unconsumed exemption; and if, for any other reason, such relation does not exist, the child has the same right that it would have upon "leaving the family." (*Lanford v. Lee*, 914.)

5. EXEMPTION FROM ADMINISTRATION — TRUST FOR CHILDREN.—Under a statute which grants an exemption of personal property from administration and the payment of debts, in favor of the widow and minor children of a decedent, and which requires the property to be delivered to the widow, "to be by her employed or used in maintenance of herself and minor children," the exemption, when set apart, must be delivered to the widow. If there is one, and to her only, but she takes and holds it impressed with the trust so prescribed by the statute. Her title or interest in the property is not exclusive, but is in common with that of the minor child or children, and she cannot, therefore, use or appropriate it exclusively for her own benefit. (*Lanford v. Lee*, 914.)

6. EXECUTORS AND ADMINISTRATORS — RIGHT AND DUTY OF SHERIFF AS ADMINISTRATOR.—After the administration of an estate has been legally cast upon a sheriff, he is thenceforward entitled to all the rights, and is bound to perform all the duties, of the administration. He must, therefore, prosecute all proper actions and suits for the collection of claims due the estate of his decedent, and is entitled to all legal and equitable defenses to actions and suits brought against such estate. (*Brewer v. Hutton*, 804.)

7. EXECUTORS AND ADMINISTRATORS—PLEDGE OF ESTATE ASSETS.—A pledge by an executor of the assets of the estate, made to secure a loan for his own personal benefit, is valid if the pledgee has no knowledge or notice of the intended perversion of the proceeds, but takes the property in good faith, believing the

loan to be made for the benefit of the estate. (*Hemmy v. Hawkins*, 863.)
See Attachment, 2, 4; Corporations, 8, 13.

EXEMPTIONS.

See Assumpsit; Attachment, 2; Executors and Administrators, 2, 4, 5; Homesteads, 2; Sheriffs, 8.

EX POST FACTO LAWS.

See Statutes, 8.

EXTRADITION.

EXTRADITION—INTERSTATE—PASSING OF PRISONERS THROUGH ANOTHER STATE—HABEAS CORPUS.—If, owing to the topography of the country, convicted prisoners cannot be conveyed from the place of their conviction to the penitentiary without passing through another state, they are not entitled, while passing through the latter state in the custody of an officer, to writs of habeas corpus, on the ground that they are illegally detained as fugitives from justice, for such facts do not present any question concerning fugitives from justice who have escaped from any other jurisdiction. (*In re Maney*, 130.)

FALSE PRETENSES.

1. FALSE PRETENSES—DEFINITION.—A common-law cheat is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest. (*State v. Renick*, 758.)

2. FALSE PRETENSES—FALSE PERSONATION—TOKENS. One who, by presenting himself under a fictitious name, and falsely representing himself to be unmarried, procures money from a woman under promise of marriage, does not thereby make of himself a false token, nor render himself liable to punishment under a statute defining the offense of obtaining money or property by false pretenses and requiring, as evidentiary matter to support a charge thereunder, a false token or writing accompanying the pretense. (*State v. Renick*, 758.)

FALSE REPRESENTATIONS.

See Damages, 8.

FINDINGS.

See Appeal, 2, 3, 5; Fixtures, 1; Judges; Mechanics' Liens, 1; Trial, 13.

FIXTURES.

1. FIXTURES—FINDING AS TO — DISTURBANCE OF, ON APPEAL.—After a jury, under proper instructions, has determined, in a controversy between a mortgagee and a mortgagor, that certain things removed from the premises by the mortgagor are not fixtures, a court, on appeal, will not disturb their verdict unless it is clear, as a matter of law, that the property was, in fact, a part of the realty. (*Philadelphia etc. Co. v. Miller*, 138.)

2. FIXTURES—MANTELS—BATHTUB—WATER HEATER.—Stock mantels, sold separately and made adaptive to any kind of a house, water heaters not attached to the building except by their plumbing connections, and modern porcelain bathtubs, all of which can readily be attached to, or detached from, the house without injuring the realty, are not fixtures as between a mortgagor and a mortgagee of the premises. (*Philadelphia etc. Co. v. Miller*, 138.)

3. FIXTURES—MIXED QUESTION OF LAW AND FACT.—The question as to whether or not a particular article or piece of ma-

chinery is a chattel or fixture is a mixed question of law and fact. (Philadelphia etc. Co. v. Miller, 138.)

See Replevin, 3, 4.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES—CONSIDERATION—EXISTING DEBTS—BURDEN OF PROOF.**—If a creditor files a bill to set aside, as fraudulent, a deed executed by his debtor, which recites the payment of a valuable consideration, and such creditor's debts are older than the deed, the burden is on the grantee to prove the payment of the purchase money; or, if the deed was executed for the payment of existing debts, to prove the validity of such debts. (Butler v. Thompson, 838.)

2. **FRAUDULENT CONVEYANCES—FRAUD OF GRANTOR—PROOF OF CONSIDERATION BY GRANTEE.**—A grantee need not prove the payment of a consideration until the fraudulent intent of the grantor is shown, but when that is shown it is incumbent on him to establish the payment by competent evidence, for the proof is almost exclusively within his knowledge and power. (Butler v. Thompson, 838.)

3. **FRAUDULENT CONVEYANCES—RECITAL OF CONSIDERATION IN DEED AS EVIDENCE—BURDEN OF PROOF AS TO CONSIDERATION AND FRAUD.**—If a creditor of a grantor files a bill in chancery, in which he attacks a deed made by the grantor as being voluntary and fraudulent, the recitals of the deed, showing that the grantee paid the grantor a valuable consideration, are not evidence against the creditor of such payment. The burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor. (Butler v. Thompson, 838.)

4. **FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES—CONSIDERATION AND GOOD FAITH—BURDEN OF PROOF.**—If a person against whom a suit is pending, and against whom a judgment is about to be taken, transfers his entire property, real and personal, including his home, to his nephew, such circumstances are indications of a fraudulent intent, especially if the uncle and his nephew are on intimate business relations. Hence, if a creditor of the grantor attacks the conveyance as fraudulent, the burden of proving the payment of a consideration and the bona fides of the transaction is cast upon the uncle and his nephew. (Butler v. Thompson, 838.)

5. **FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES—QUANTUM OF PROOF.**—If a conveyance of property from an uncle to his nephew is attacked upon the ground that it is fraudulent as to creditors, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction, than if they were strangers. (Butler v. Thompson, 838.)

6. **FRAUDULENT CONVEYANCES—TRANSFER OF PARTNERSHIP PROPERTY FRAUDULENT AS TO CREDITORS.**—If two members of a partnership, being insolvent, make a transfer of its assets to the other member of the firm, the transfer is fraudulent as to partnership creditors, though made upon an adequate and valuable consideration. (Smith v. Heineman, 150.)

7. **FRAUDULENT CONVEYANCES—TRANSFER OF PERSONALTY—KNOWLEDGE OF PURCHASER.**—If a person sells personal property, such as a stock of goods, with intent to hinder, delay, or defraud his creditors, and the buyer knows of such intent, or is informed of such circumstances as would lead a person of ordinary care and prudence to institute inquiry which, if followed, would disclose the intent, the transaction is fraudulent, though the pur-

chaser may pay an adequate and valuable consideration; and this principle applies to a sale made by one partner to his copartner of the former's interest in the assets of the partnership business, particularly where the seller is insolvent. (*Smith v. Heineman*, 150.)

8. FRAUDULENT CONVEYANCES—VALIDITY OF TRANS-ACTION—SHIFTING OF BURDEN OF PROOF.—If a creditor files a bill, attacking a transfer of property made by his debtor as fraudulent, with intent to hinder, delay, and prevent the plaintiff from recovering his debt, the burden of proving fraud ordinarily rests upon the plaintiff, but circumstances may exist which will relieve him from this burden, and cast upon the party upholding the transaction the burden of showing its validity. (*Butler v. Thompson*, 838.)

GARNISHMENT.

1. GARNISHMENT.—AN AMENDMENT OF AN AFFIDAVIT for a writ of garnishment is properly allowed for the purpose of correcting a clerical error in the date thereof. (*Wattles v. Wayne Circuit Judge*, 590.)

2. GARNISHMENT—DISCLOSURE — CONCLUSIVENESS.—A disclosure by a garnishee that he does not know whether a note past due, executed by him to the principal defendant, was still in the latter's hands at the time of the service of process is not conclusive against his liability to the plaintiff. (*Serviss v. Washtenaw Circuit Judge*, 507.)

3. GARNISHMENT — FOREIGN JUDGMENTS.—An action brought upon a foreign judgment is an action upon contract within the meaning of a statute authorizing the issuance of garnishment process in all personal actions arising upon contract. (*Wattles v. Wayne Circuit Judge*, 590.)

4. GARNISHMENT—JURISDICTION—SITUS OF DEBT.—The courts of a state may, by process of garnishment, acquire jurisdiction over a nonresident defendant for the purpose of subjecting a debt due him from a citizen of that state to the payment of plaintiff's demand. (*Serviss v. Washtenaw Circuit Judge*, 507.)

5. GARNISHMENT—NONRESIDENT DEFENDANT—SERVICE OF PROCESS.—The validity of substituted form of service upon the nonresident principal defendant in garnishment proceedings does not depend upon the disclosure of the garnishee or his denial of indebtedness, although no judgment can be had in such case against the principal defendant, unless some credits can be found in the hands of the garnishee. The existence of such credits is the subject of inquiry upon the statutory issue. (*Serviss v. Washtenaw Circuit Judge*, 507.)

6. GARNISHMENT.—A negotiable note is subject to garnishment after its maturity. (*Serviss v. Washtenaw Circuit Judge*, 507.)

7. GARNISHMENT—WHAT SUBJECT TO.—Nothing can be reached in the hands of a garnishee having its origin in transactions subsequent to the issuance of the writ of garnishment. (*Wattles v. Wayne Circuit Judge*, 590.)

See Attachment, 3-10; Sales, 2.

GIFTS.

1. GIFTS CAUSA MORTIS — DELIVERY—HUSBAND AND WIFE.—If a wife, within an hour of her death, called for her nephew, and, on being informed that he was not present, told her husband that she gave to her nephew all of her property then in the husband's possession, and directed him to deliver it to such nephew, which he agreed to do, this constitutes a good gift causa mortis as to personal property and a good delivery of such property. (*Caylor v. Caylor*, 331.)

2. GIFTS—DELIVERY.—There is no difference between gifts *causa mortis* and those *inter vivos* as to the requirement of an intention in the donor to give, and a delivery to pass title, except that in the former case the passing of title is revocable by the recovery of the donor or his death from a cause other than that anticipated. (*Liebe v. Battman*, 705.)

3. GIFT—IMPERFECT DELIVERY.—Where a man having committed suicide in his private room, a sealed and addressed envelope is found on his table, containing a promissory note in deceased's favor and generally indorsed by him, although the deceased undoubtedly intended to make a gift of the note to the addressee of the envelope, the intended gift must fail for imperfect delivery. (*Liebe v. Battman*, 705.)

4. GIFT.—TO CONSTITUTE THE DELIVERY necessary to the completion of a gift, there must be a parting with the dominion over the subject matter, with a present design that the title shall pass to the donee, and this so completely that, if the owner again resumes control over it, without the consent of the donee, he becomes liable as a trespasser, except after revocation of a gift *causa mortis*. (*Liebe v. Battman*, 705.)

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—BOND NOT SIGNED BY PRINCIPAL.—A bond given by a guardian, in which the name of the guardian, or principal, appears in the body thereof, but which is not signed by him, is not a statutory bond, and does not, therefore, justify the issuance of an execution against the sureties thereon as provided by the statute. (*Painter v. Mauldin*, 902.)

2. GUARDIAN AND WARD—INFORMAL BOND—VALIDITY OF, AS A COMMON-LAW BOND.—Although a guardian's bond has not been signed by him, and is not, therefore, a statutory bond, strictly speaking, yet, after it has been approved and acted on, it is good as a common-law liability, upon which the obligors may be sued in a court of law. Hence, after the liability of the guardian to his ward has been fixed, on final settlement, his sureties are also bound. (*Painter v. Mauldin*, 902.)

3. GUARDIAN AND WARD—NATURAL GUARDIAN—STEPFATHER.—An orphan child's stepfather is not its natural guardian. (*People v. Schoonmaker*, 560.)

HABEAS CORPUS.

1. HABEAS CORPUS—DENIAL OF JURISDICTION BY PETITIONER.—One who appeals to the jurisdiction of a court to have his right of personal liberty determined on a writ of habeas corpus cannot question the power of the court to proceed to a complete determination of the case. (*In re Maney*, 130.)

2. HABEAS CORPUS—PASSING OF PRISONERS THROUGH ANOTHER STATE.—If prisoners, legally convicted and sentenced for the crime of murder, are, in a case of necessity, taken through another state on their way to the penitentiary, and apply for writs of habeas corpus in the latter state, their application must be denied, where it is admitted that there was a valid judgment of conviction, for such judgment will be given credit under the "full faith and credit" clause of the federal constitution. (*In re Maney*, 130.)

See Extradition.

HIGHWAYS.

See Easements; Municipal Corporations, 12.

HOMESTEADS.

1. HOMESTEAD—CLAIM OF, WHEN RES JUDICATA.—A judgment bars all defenses which the defendant had an opportunity to make. If a judgment debtor makes a transfer of real property, which his creditor seeks to have set aside as fraudulent, and to have the property subjected to the satisfaction of his judgment by a sale on execution, a claim of homestead would be a complete defense to the action. Therefore, if the debtor permits judgment to be rendered, subjecting his entire interest in the land to the satisfaction of the judgment, without asserting his right to a homestead, the judgment is final, and conclusive of the rights of the parties to the litigation, and he cannot assert such claim in any subsequent proceeding. (*Traders' Nat. Bank v. Schorr*, 17.)

2. HOMESTEAD—EXEMPTION IN PROCEEDS OF PROPERTY FRAUDULENTLY CONVEYED TO THE GRANTOR'S WIFE.—If a husband owns a lot, and, being in debt, voluntarily conveys it to his wife, who sells it and invests the proceeds, in her own name, in other land, on which the wife erects a house, which both occupy as a home, the husband may, upon a bill brought against him by his creditors to condemn his conveyance as fraudulent and to subject the proceeds to execution, claim a homestead in the land upon which he and his wife are living, although the property conveyed by him was not, and never had been, his homestead. (*Yates v. Adams*, 910.)

3. HOMESTEAD—JUDGMENT LIEN.—Under the statutes of the state of Washington, a general personal judgment does not become a lien upon a homestead. (*Traders' Nat. Bank v. Schorr*, 17.)

4. HOMESTEADS—OCCUPANCY.—If a person purchases land, intending to occupy it as a homestead, and in good faith moves thereon and begins the erection of a dwelling-house one day before a judgment under which a lien is claimed is filed, such property is exempt as a homestead, although occupied by a tenant for several months thereafter. (*Upton v. Coxen*, 341.)

5. HOMESTEADS — OCCUPANCY.—The purchase of a home with the intention to occupy it as a homestead, followed by actual occupancy within a reasonable time, impresses it, ab initio, with the homestead character and inviolability. (*Upton v. Coxen*, 341.)

6. HOMESTEADS ON PUBLIC LANDS—MORTGAGE PRIOR TO PATENT.—A mortgage given in good faith by one who has entered land as a homestead under the United States statutes, and has acquired the receiver's final certificate, is valid against the mortgagor and those claiming under him, though given prior to the issue of the patent. (*Melnhold v. Walters*, 888.)

7. HOMESTEADS.—TEMPORARY POSSESSION BY A TENANT whose rights and use are not inconsistent with the homestead rights of the owner does not deprive the premises of their homestead character. (*Upton v. Coxen*, 341.)

See Acknowledgment, 1; Trespass, 1.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE — ACTIONS BETWEEN — PERSONAL TORT.—In the absence of an enabling statute, a wife cannot maintain suit against her husband for a personal tort committed upon her during coverture. (*Bandfield v. Bandfield*, 550.)

2. ACTIONS—PLEADING—HUSBAND AND WIFE.—In an action to enforce the promise of a husband to his wife to turn over all of her property after her death to her nephew, a complaint failing to allege the solvency of the wife's estate, or that it has been settled, is bad and insufficient. (*Caylor v. Caylor*, 331.)

3. HUSBAND AND WIFE—ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTIONS.—UNDER A STATUTE which permits a married woman to sue and be sued as if sole, abolishes all laws imposing civil disabilities upon her not existing against her husband, and which provides that, for any unjust usurpation of her rights, she may appeal, in her own name, to the courts for redress and protection. she may, in her own name, maintain an action for damages for the alienation of her husband's affections. (Beach v. Brown, 98.)

4. HUSBAND AND WIFE — ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE AFTER DIVORCE.—The fact that a wife has obtained a divorce does not preclude her from maintaining an action for damages for the alienation of her husband's affections, particularly where the wrongful acts of which she complains created the necessity for, and caused, the action for divorce. (Beach v. Brown, 98.)

5. HUSBAND AND WIFE — ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE AFTER DIVORCE—EVIDENCE.—If a wife obtains a divorce, and then brings an action for the alienation of her husband's affections, his letters to her during coverture, showing his affection for her, are admissible in evidence. (Beach v. Brown, 98.)

6. HUSBAND AND WIFE — ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE—EVIDENCE OF AFFECTION—PRESUMPTION.—In an action by a wife for the alienation of her husband's affections, the law presumes that he had an affection for her from the fact that he lived and cohabitated with her, and had children by her; and this presumption continues until it is overthrown by a fair preponderance of testimony to the contrary. (Beach v. Brown, 98.)

7. HUSBAND AND WIFE — ALIENATION OF HUSBAND'S AFFECTIONS—ACTION BY WIFE—SELF-SERVING TESTIMONY OF DEFENDANT.—In an action by a wife for the alienation of her husband's affections, testimony as to the husband's avowed object in writing affectionate letters to her is inadmissible on the ground of being self-serving. (Beach v. Brown, 98.)

8. HUSBAND AND WIFE—CONTRACTS—DECEDENTS' ESTATES.—A contract between a husband and his childless wife, made very shortly before her death, that he would turn over to her nephew all of her property, and pay to such nephew, without diminution, a debt owed by the husband to his wife, is without consideration, and cannot be enforced after the wife's death, under a statute by which, in the absence of a will, a husband inherits the entire estate of his wife. (Caylor v. Caylor, 331.)

9. HUSBAND AND WIFE — HUSBAND'S DISPOSAL OF WIFE'S SEPARATE PERSONAL PROPERTY—RATIFICATION—ILLITERACY.—In applying the principles of equitable estoppel to the acts of a married woman, which constitute a ratification of her husband's acts with respect to her separate personal property, it is immaterial that she could not read or write, and understood the English language only with difficulty, where no advantage is shown to have been taken of her ignorance. (Hoene v. Pollak, 189.)

10. HUSBAND AND WIFE — HUSBAND'S DISPOSAL OF WIFE'S SEPARATE PERSONAL PROPERTY—RATIFICATION—ILLUSTRATION.—If a wife is a majority stockholder in a corporation, and her husband, who is also a stockholder therein, votes her stock for her in favor of a transfer of all of the corporate property to another corporation. which transfer is made, and the property paid for by capital stock of the latter company issued to the stockholders of the former, and the wife, after thus acquiring stock of the pur-

Chasing corporation, knowingly disposes of a portion thereof, she thereby assents to what has been done, even if there was no prior authority given for the act of her husband. (Hoene v. Pollak, 189.)

11. HUSBAND AND WIFE—RIGHT OF WIFE TO SUE ALONE—DESERTION OF HUSBAND.—Under a statute authorizing a wife to sue in her own name for injury to her person or character if her husband refuses to join with her, his desertion for several years, his failure to support her, and his marriage to another woman, are tantamount to a refusal to join in any action brought by her. (Baumelster v. Markham, 397.)

12. HUSBAND AND WIFE—SEPARATE PERSONAL PROPERTY OF WIFE—DISPOSAL OF—STATUTE—STOCK OF CORPORATION.—Under a statute which authorizes a husband and wife to dispose of the latter's personal property by parol, the husband, without authority in writing, may, with the assent of his wife, vote stock owned by her in a corporation at corporate meetings, and consent for her to a transfer of all of the corporate property to another corporation, to be paid for by capital stock of the latter company issued to the stockholders of the former, as the capital stock of a corporation is personal property. (Hoene v. Pollak, 189.)

13. TENANCY BY ENTIRETIES GROWS OUT of the unity of husband and wife and is unlike that of joint tenants, who are each seised of an undivided moiety. Each of the spouses is seised of the whole, and not of undivided moieties. (Dickey v. Converse, 568.)

See Ejectment, 2; Gifts, 1; Witnesses.

IMPROVEMENTS.

See Cotenancy, 4, 6; Landlord and Tenant, 1, 3, 7; Real Property, 2-5; Trusts, 5.

INCEST.

INCEST—WHAT IS—CONSENT OF FEMALE.—If a male person and a female person, being within the degree of consanguinity within which marriage is prohibited by law, have sexual intercourse with each other, he is guilty of incest, whether such intercourse was had with or without her consent. (State v. Nugent, 133.)

INFANTS.

See Executors and Administrators, 2; Evidence, 1; Limitations of Actions, 4; Master and Servant, 4-9; Negligence, 14, 19; Railroads, 21, 23; Real Property, 1; Wills, 8-10.

INJUNCTIONS.

1. INJUNCTIONS — BREACH OF—JUSTIFICATION.—The deliberate disobedience of an injunction by county officers in proceeding with road work and paying therefor, cannot be justified on the ground of good faith, nor can there be any ratification of their act by the board of supervisors, nor any estoppel which nullifies the command of the court. (Webster v. Douglas County, 870.)

2. INJUNCTION — MODIFICATION.—An order modifying an injunction restraining a board of supervisors from expending money or doing work on highways under an illegal resolution, so as to allow necessary repairs to be made upon county roads designated by such resolution for the expenditure of money, merely permits the making such repair on such roads as is necessary to make travel safe, and does not permit general road work to be carried on as

contemplated by such unlawful resolution. (*Webster v. Douglas County*, 870.)

3. **INJUNCTION TO PREVENT OVERFLOW OF LAND.**—An injunction is a proper remedy where a defendant has unlawfully caused the plaintiff's land to be overflowed, and thereby damaged, and threatens and intends to continue so to do. (*Carlson v. St. Louis River etc. Co.*, 610.)

See *Equity*, 3, 11; *Officers*, 3.

INSOLVENCY.

See *Associations*, 1; *Debtor and Creditor*, 1.

INSTRUCTIONS.

1. **INSTRUCTIONS—ASSUMING FACT.**—An instruction which assumes a fact not proved should be refused. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

2. **TRIAL—INSTRUCTIONS—PEREMPTORY.**—To authorize the giving of peremptory instructions to the jury to find for defendant, it must appear that, admitting all of the testimony to be true, and every inference fairly deducible therefrom, and considering all of the undenied allegations of the petition, the plaintiff has failed to support his claim. (*Baumeister v. Markham*, 397.)

3. **JURY TRIAL—INSTRUCTIONS—GENERAL ACCURACY.**—Although instructions, as given by the trial court, contain verbal inaccuracies, yet if, when taken as a whole, they fairly present the law applicable to the case, they will be held sufficient on appeal. (*Perham v. Portland Electric Co.*, 730.)

See *Appeal*, 4; *Damages*, 1; *Negligence*, 23.

INSURANCE.

1. **INSURANCE—ACCIDENT.**—Death caused by blood poisoning, superinduced by the bite of an insect, is not the result of "poisoning in any form or manner," or "contact with poisonous substances," within the meaning of an accident insurance policy. (*Omberg v. United States Mutual Acc. Assn.*, 413.)

2. **INSURANCE—ACCIDENT.**—If the death of the insured is caused by blood poisoning, superinduced by the bite or sting of an insect, such death is caused through external, violent, and accidental means, within the meaning of an accident insurance policy. (*Omberg v. United States Mutual Acc. Assn.*, 413.)

3. **INSURANCE—ACCIDENT—EVIDENCE.**—In an action for loss under a policy of insurance against death by accident, a statement made by the decedent to his physician, upon which the physician forms his opinion and makes a prescription, is competent evidence to prove what was the actual cause of his illness and death, although the symptoms are such as might be produced either by disease or by the accident. (*Omberg v. United States Mutual Acc. Assn.*, 413.)

4. **INSURANCE—BENEFICIARIES—DISTRIBUTION OF PROCEEDS.**—Under a policy of life insurance taken by a wife upon her life, providing that the insurance money shall be payable to and for the sole and separate use of her husband and children, he and they do not take the insurance by inheritance, but, upon her death, the insurance money must be divided per capita between the husband and living children. The only effect of the death of one of such children before that of the insured is to reduce the number of parts into which the insurance fund is to be divided. (*Bell v. Kinner*, 410.)

5. INSURANCE.—DUE PROOF of a claim of loss under a policy of insurance means such a statement of facts, reasonably verified, as, if established in court, would prima facie require payment of the claim, and does not mean some particular form of proof which the insurer arbitrarily demands. The statement of one adequate fact in the proofs does not exclude others omitted through mistake or ignorance. (*Jarvis v. Northwestern Mut. Relief Assn.*, 895.)

6. INSURANCE, LIFE—PROVISION AS TO SUICIDE.—A provision in a life insurance policy that suicide by the insured, whether sane or insane, shall avoid it, is valid, and covers the case of one who intentionally commits self-destruction, understanding the physical nature and consequences of the act, although not conscious of its moral quality or consequences. (*Hart v. Modern Woodmen of America*, 380.)

7. INSURANCE — PLEADING, AMENDMENT TO.—A complaint in an action on an insurance policy to recover for an incurable disability permanently incapacitating the insured to perform manual labor, alleging paralysis as the cause of such disability, may be amended so as to allege other and different causes for plaintiff's disability than paralysis, although the claim filed with the insurance company states the cause of disability as paralysis only, and the policy by its terms bars all claims not filed within six months of the maturity of the contract. (*Jarvis v. Northwestern Mut. Relief Assn.*, 895.)

See Cotenancy, 2

INTEREST.

INTEREST UPON MONEY UNLAWFULLY DRAWN OUT OF A COUNTY TREASURY may be allowed from the time it was thus drawn out, in an action by taxpayers to recover it from public officials and contractors. (*Webster v. Douglas County*, 870.)

INTERSTATE COMMERCE.

See Statutes, 12.

JUDGES.

JUDGES WHO HAVE NOT HEARD EVIDENCE CANNOT MAKE FINDINGS OF FACT.—If one judge presides at the trial of an action, another judge has no authority on a motion for judgment notwithstanding the verdict, to make findings of fact upon evidence not heard by him. (*Aultman & Taylor Co. v. O'Dowd*, 603.)

JUDGMENTS.

1. JUDGMENTS—WHEN APPEALABLE.—A judgment by the lower court that plaintiff's attorneys, who had defrayed the expenses of the appeal and secured a reversal and judgment taxing costs against defendant, had no lien on the judgment for costs, and ordering the costs taxed in pursuance of the mandate of the supreme court, to be offset against other judgments against the plaintiff is a judgment from which an appeal lies. (*Victor Gold etc. Min. Co. v. National Bank*, 767.)

2. JUDGMENTS AS CONTRACTS.—Judgments are classified as contracts with reference to remedies upon them. (*Wattles v. Wayne Circuit Judge*, 590.)

3. JUDGMENTS—DEFAULT ON DEFECTIVE SERVICE.—Where, in an action commenced by filing a declaration, the declaration is served, and, upon defendant's nonappearance, a judgment is

taken upon entry of his default, but, although a proper rule to plead is entered, there is no service of notice of the rule, such failure of service, though it renders the judgment irregular, is not such a defect as to render it void for want of jurisdiction and therefore subject to collateral attack. (*Griffin v. McGalvin*, 564.)

4. JUDGMENTS—MERGER.—A judgment is a general lien upon all of the debtor's real estate, and does not merge when the judgment creditor acquires title to a particular portion of such lands, but may, in ordinary cases, be enforced against the remaining lands belonging to the debtor. (*Clark v. Glos*, 223.)

5. JUDGMENTS—MERGER.—If a judgment is a lien upon two pieces of land, a person who has taken a deed from the judgment debtor of one of the pieces of land, and afterward obtained an assignment of the judgment to himself may enforce the judgment against the piece of land, the title to which remains in the judgment debtor, or a prior grantee from him subject to the judgment. In such case, the judgment does not merge in the purchase of one of the pieces of land. (*Clark v. Glos*, 223.)

6. JUDGMENTS—MERGER—ASSIGNMENT.—The rule that an assignment of a judgment to the owner of property works a merger of such judgment does not apply to a grantee of the judgment debtor, unless such grantee takes the conveyance subject to the judgment, and agrees to pay it as part of the consideration. (*Clark v. Glos*, 223.)

7. JUDGMENT — MERGER — DESTRUCTION OF LIEN.—A judgment does not merge a cause of action, so that it cannot be sued on again; neither does it destroy a lien acquired on property which is the subject matter of the suit. (*Lambert v. Nicklass*, 828.)

8. JUDGMENTS — FOREIGN — ACTION ON—JURISDICTION. THE JUDGMENT-ROLL itself must affirmatively show jurisdiction where an action is brought on a foreign judgment. (*Cunningham v. Spokane etc. Co.*, 113.)

9. JUDGMENT OF SISTER STATE—ACTION ON—ADMISSIBILITY OF AMENDED JUDGMENT-ROLL.—If the defendant does not appear, and judgment is taken against him by default, but the return does not show the necessary jurisdictional fact of service, though the proper party was in fact served, the return may be amended, after the entry of judgment, to show such fact, and without personal notice to the defendant of such proposed amendment, where the statute does not require it; and the judgment-roll, after such amendment, is admissible in evidence in an action on the judgment brought in another state. (*Cunningham v. Spokane etc. Co.*, 113.)

10. JUDGMENT—MISNOMER IN ENTRY.—A judgment or order is not rendered void by its own misnomer of the defendant, where the record supplies data for its amendment, *nunc pro tunc*, so as to make it speak its rendition against the defendant by his true name. (*Ex parte Howard-Harrison Iron Co.*, 928.)

11. JUDGMENTS OBTAINED UNDER ASSUMED NAME—VALIDITY.—If the identical person who receives an injury sues to recover therefor in an assumed name, a judgment in her favor is not invalid for the reason that she sues under a name adopted by her for the theatrical stage, and by which she is generally known. (*Baumelster v. Markham*, 397.)

12. JUDGMENT, PREMATURE ENTRY OF.—A judgment rendered before the appearance day specified in the summons or notice is irregular and erroneous, but not void. (*Ex parte Howard-Harrison Iron Co.*, 928.)

13. JUDGMENTS—VACATION BY EQUITY COURT.—A court of equity should not set aside a judgment at law for lack of service of process by the officer making the return of service, except upon clear, satisfactory, and convincing proof. (*Huntington v. Crouter*, 728.)

See Appeal, 8; Attachment, 7; Attorney and Client, 4, 5; Conflict of Laws, 2; Constitutions, 7; Creditor's Suit; Debtor and Creditor, 4; Equity, 3, 10-12; Garnishment, 3; Homestead, 3; Mortgages, 6; Municipal Corporations, 2, 8; Officers, 5.

JUDICIAL SALES.

1. JUDICIAL SALES—CHANGE OF PLACE OF SALE—CONFIRMATION.—The adjournment of a sale of land by an administrator from the courthouse door, where it is advertised to take place, to another place nearer the land, is a mere irregularity, which does not render the sale void, and which is cured by confirmation of the sale by the probate court. (*Thompson v. Burge*, 369.)

2. JUDICIAL SALES—DEFECT IN NOTICE—COLLATERAL ATTACK.—After confirmation of a judicial or probate sale, it cannot be defeated or avoided by showing collaterally that there was a defect in the notices of sale. (*Thompson v. Burge*, 369.)

3. JUDICIAL SALES—LACHES IN MOVING TO SET ASIDE. An application to set aside a sheriff's sale for an irregularity which makes the sale merely voidable must be made within a reasonable time, and at least within a period less than twenty years from the time of the sale. (*Clark v. Glos*, 223.)

4. JUDICIAL SALES—PROBATE SALES.—The strict rules applicable to tax sales cannot be applied to probate sales. (*Thompson v. Burge*, 369.)

5. JUDICIAL SALES—RIGHTS OF BONA FIDE PURCHASERS.—A court of equity cannot interfere with a purchaser for value from the holder of a sheriff's deed, unless such purchaser can be charged with fraud or other inequitable conduct or notice thereof connected with the sheriff's sale. (*Clark v. Glos*, 223.)

6. JUDICIAL SALES—SETTING ASIDE COLLATERAL ATTACK.—If the court rendering judgment is not called upon to set aside a sale thereunder by the execution defendant or his grantee holding the title when the sale was made, a court of equity cannot inquire into or set aside the sale at the instance of a stranger, upon collateral attack, for defects rendering the sale merely voidable. (*Clark v. Glos*, 223.)

7. JUDICIAL SALES—SETTING ASIDE—INADEQUACY OF PRICE.—A judicial sale cannot be set aside for mere inadequacy of price, unless that is so small as to amount to evidence of fraud. (*Clark v. Glos*, 223.)

8. JUDICIAL SALES—SETTING ASIDE—IRREGULARITIES—LACHES.—Failure to sell land subject to a judgment lien in the inverse order of alienation of the several parcels thereof by the judgment debtor is an irregularity rendering the sale voidable, but not absolutely void, and an objection to the validity of the sale on that ground may be lost by delay. (*Clark v. Glos*, 223.)

9. JUDICIAL SALES—SETTING ASIDE—LACHES.—If a judgment debtor, or a grantee holding title from him, at the time of a sheriff's sale, shows no excuse for his delay in objecting to the sale until after it has been consummated and the purchaser thereat has conveyed to a third party buying in good faith, such debtor or grantee is not entitled to have such sale set aside. (*Clark v. Glos*, 223.)

10. JUDICIAL SALES — SETTING ASIDE—LACHES.—Objections to a judicial sale upon the ground that the property levied upon was sold en masse, and that the prices realized were inadequate, are objections which, at most, merely make the sale voidable; and application to have the sale set aside because of such objections must be made by motion, before the right of redemption has expired, in the court from which the execution was issued. The right to make such motion may be lost by delay. (Clark v. Glos, 223.)

11. JUDICIAL SALES—SETTING ASIDE—LOSS OF REMEDY. If a judgment debtor or his grantee, having an ample remedy by motion to set aside a judicial sale for mere irregularities, fails to avail himself of such remedy, equity cannot grant relief, unless he makes a strong case of fraud, wrong, or oppression. (Clark v. Glos, 223.)

JURISDICTION.

1. JURISDICTION.—PROCESS WHICH IS AMENDABLE is not void, but will support a judgment. Hence, a judgment or order of a commissioner's court, raising an assessment of property of the "Howard-Harrison Pipe Works," instead of the "Howard-Harrison Iron Company," the true name of the defendant, is not void, though the summons or notice and return of service contained such misdescription or misnomer of the defendant, as such process is amendable. (Ex parte Howard-Harrison Iron Co., 928.)

2. JURISDICTION—SERVICE.—It is the fact of service which gives a court jurisdiction, not the proof of service. (Cunningham v. Spokane etc. Co., 113.)

See Attachment, 5; Conflict of Laws, 2; Constitutions, 7; Executors and Administrators, 3; Garnishment, 4; Habeas Corpus, 1; Judgments, 8-12; Wills, 3, 4.

JURY.

See Bailments, 2; Negligence, 13, 20; Master and Servant, 4; Railroads, 17.

JURY TRIAL.

See Instructions, 3; Statutes, 8.

JUSTICE OF THE PEACE.

See Equity, 10; Pleading, 2.

LACHES.

See Judicial Sales, 3, 8-10; Officers, 1; Trusts, 7.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—COVENANT FOR IMPROVEMENTS.—If a lease contains a covenant binding the landlord to make certain improvements and repairs, and he refuses to make them after notice from the tenant, the latter may make them in accordance with the covenant and charge the reasonable value thereof against the rent. In such case, the purchase of lumber and placing it upon the premises by the tenant, with the intention on his part of making the improvements as provided in the lease, constitutes a sufficient payment of the rent to prevent a forfeiture of the lease. (Beardsley v. Morrison, 795.)

2. LANDLORD AND TENANT — DEFECTIVE PREMISES—LIABILITY FOR RENT.—Rent is payable even when demised premises have become untenable by inherent defect, provided they

were habitable at the time of the demise, there being no fraud on the part of the landlord. (*Petz v. Voigt Brewery Co.*, 531.)

3. LANDLORD AND TENANT.—AN EQUITABLE LIEN UPON LAND FOR IMPROVEMENTS thereon cannot be maintained unless they were made for the benefit of the land, and do benefit it. Hence, the rule does not apply to a case where it is agreed between the lessor and lessee that structures erected on the leased premises may be removed at the option of the lessee, and that they shall not be considered as attached to the land. (*Phillips v. Reynolds*, 107.)

4. LANDLORD AND TENANT—HOLDING TO END OF YEAR—"LAND"—TOWN LOT—CONSTRUCTION OF STATUTE.—The word "land," in a statute which provides that if there is a tenant for life, or other uncertain interest in land which is let to another, "the lessee may hold the land to the end of the current year of the tenancy, paying rent therefor," is used in a restricted sense to denote farming or agricultural land, rented for an annual rental, and does not apply to town lots used only for building purposes. (*Shufflin v. House*, 851.)

5. LANDLORD AND TENANT—REPAIRS.—A landlord, in the absence of covenants on his part, is not required to repair the demised premises, even when they become defective through deterioration or decay. (*Petz v. Voigt Brewery Co.*, 531.)

6. LANDLORD AND TENANT—LIABILITY FOR RENT WHILE REPAIRS ARE BEING MADE.—If leased premises become out of repair or dangerous and unfit for occupancy while the tenant is in possession, and there is no agreement in the lease that the lessors shall make repairs, the lessee is liable for rent while the lessor is making repairs with the lessee's consent, although he is excluded from the premises during such time, unless there is an agreement that rent should not continue during that time. (*Petz v. Voigt Brewery Co.*, 531.)

7. LANDLORD AND TENANT—OPTION TO EXTEND TERM OR TO PURCHASE IMPROVEMENTS.—If premises are leased for a term of years, with a provision in the lease that the lessee may make improvements on the property, and that, at the end of the term, the lessor will either "extend" the lease, or buy the improvements, the lessor cannot, upon the expiration of the term, defeat his obligation to renew the lease, or to buy the improvements, by extending the lease merely for one day. A reasonable construction is that the lessor should either buy the structures, or renew the lease for the original period, and he cannot, therefore, maintain an action to recover the possession. (*Phillips v. Reynolds*, 107.)

8. LANDLORD AND TENANT—TOWN LOT—LEASE OF—DEATH OF LIFE TENANT—TERMINATION OF LEASE.—All unexpired leases made by a life tenant terminate at his death, except as otherwise provided by statute. Hence, an unexpired lease given by a life tenant to another person, on a town lot used only for building purposes, terminates with the death of the life tenant, and does not run, under the statute of West Virginia, "to the end of the current year of the tenancy," as it would in the case of agricultural or farming lands. Therefore, the rent for what is left of the term belongs to the remainderman, and not to the life tenant's lessee, who has sublet the premises. (*Shufflin v. House*, 851.)

LARCENY.

LARCENY—CONSENT OF OWNER.—To constitute the offense of larceny, there must be a taking of property without the consent of the owner. Therefore, the crime is not constituted where

an agent of such owner, acting under the latter's instructions, aids and abets the suspected thieves in taking the property, the object of the scheme being to discover and entrap the guilty parties. (*State v. Hull*, 694.)

LAW OF PLACE.

See Contracts, 3.

LIENS.

See Agistment, 1, 2; Attorney and Client, 2-5; Homesteads, 3; Judgments, 7; Landlord and Tenant, 3; Mechanics' Liens; Vendor and Purchaser.

LIMITATION OF ACTIONS.

1. **LIMITATIONS OF ACTIONS.**—A statute of limitations, strictly so called, operates on the remedy directly. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

2. **LIMITATION OF ACTIONS.**—The statute of limitations in force when an action is commenced governs, in the absence of some indication therein, or in some other provision of law, to the contrary. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

3. **LIMITATIONS OF ACTIONS—CITY WARRANTS.**—The statute of limitations does not commence to run against a city warrant until there is money in the city treasury which may be applied to its payment and until its holder has had such notice as will enable him to present it for payment to the city treasurer. (*Potter v. New Whatcom*, 135.)

4. **LIMITATION OF ACTIONS—MINOR HEIRS.**—An action of ejectment for the recovery of land sold by an administrator may be brought, under the Kansas statute, by one of the minor heirs of the deceased, within two years after the disability of infancy has been removed. (*Thompson v. Burge*, 369.)

5. **LIMITATIONS OF ACTIONS—PLEA OF STATUTE BY ONE CREDITOR TO DEFEAT ANOTHER.**—A creditor cannot, during the lifetime of his debtor, and in a suit against the latter, plead the statute of limitations to defeat the claim of another creditor, in whole or in part. He is not entitled to the benefit of such plea. (*Welton v. Boggs*, 833.)

6. **LIMITATIONS OF ACTIONS—PLEA OF STATUTE—COMPELLING DEBTOR TO PLEAD—PERSONAL PRIVILEGE.**—The law does not compel a living debtor to plead the statute of limitations. It is a personal privilege which he can avail himself of or not, as he pleases. (*Welton v. Boggs*, 833.)

7. **LIMITATIONS OF ACTIONS—PLEA OF STATUTE BY JUDGMENT CREDITOR—COMPELLING DEBTOR TO PLEAD—ILLUSTRATION.**—If a judgment creditor brings a suit in equity to subject the lands of his debtor to the satisfaction of the judgment, and sets up the existence of an older judgment in favor of another person, which is barred by the statute of limitations, but the defendant, being alive, does not plead the statute as to that judgment, which, if done, would give the plaintiff's judgment priority, the complainant cannot compel him to do so, nor file such plea himself. The judgment debtor alone can make the plea available. (*Welton v. Boggs*, 833.)

8. **LIMITATIONS OF ACTIONS—PLEA OF STATUTE BY STRANGER—COMPELLING DEBTOR TO PLEAD.**—The privilege of the plea of the statute of limitations being personal, a mere stranger to the claim, as a creditor, although he may be injuriously

affected by his debtor's failure to set up the statute, cannot do so himself, or compel his debtor to do so. (*Welton v. Boggs*, 833.)

See Attachment, 3; Cotenancy, 3; Statutes, 2-7, 24; Wills, 4.

MANDAMUS.

1. **MANDAMUS — COMPELLING EXECUTION OF DEED UNDER CERTIFICATE OF SALE.**—Mandamus is not the proper remedy of one who is entitled to a deed under a certificate of sale to compel the execution of such deed by a master in chancery. His remedy is by summary proceeding to be heard before the chancellor. (*People v. Bowman*, 265.)

2. **MANDAMUS TO COMPEL TOWN TO ISSUE WARRANT IN PAYMENT OF JUDGMENT.**—IT IS NO DEFENSE, to a writ of mandate to compel a town to issue its warrant in payment of a judgment, that the contract upon which the judgment was obtained was void because, at the time of entering into it, the town was beyond the constitutional limit of indebtedness. (*Smith v. Ormsby*, 110.)

3. **MANDAMUS—ISSUANCE OF WRIT—COMPLAINT AND SUMMONS NOT NECESSARY.**—Under a statute providing that a writ of mandate "must be issued upon affidavit on the application of the party beneficially interested," a complaint and summons are not required, as in ordinary civil actions. (*Smith v. Ormsby*, 110.)

See Carriers, 3; Municipal Corporations, 2.

MARRIAGE AND DIVORCE.

1. **MARRIAGE BY CONTRACT.**—A contract of marriage made *per verba de praesenti*, without a ceremony, and without witnesses, but between competent persons, amounts to an actual marriage and is valid. (*Atlantic City R. R. Co. v. Goodin*, 652.)

2. **MARRIAGE AND DIVORCE — ACTION BY DIVORCED WIFE FOR INCREASED ALIMONY—PROPERTY RIGHTS—RES JUDICATA.**—Under the statute of Minnesota, a complaint for divorce is good without any allegation as to property, or property rights. It is unnecessary to anticipate a claim for alimony, and it is immaterial that the defendant is not within the state. So, if a husband brings a suit for divorce against his wife, who is temporarily absent from the state, and she, being personally served by a delivery of copies of the summons and complaint to her, fails to appear or answer, and the court, though the complaint is wholly devoid of any allegation as to property, or rights therein, or as to alimony, finds, as a fact, that the husband has property, and decrees not only that the parties be divorced, but that the wife have an allowance and permanent alimony in lieu of all claims upon the husband's property, the presumption is, in a subsequent suit by the divorced wife for increased alimony, and where there are no allegations to the contrary in her complaint, that all of the husband's property was within the jurisdiction of the court in which the divorce proceedings were instituted. Hence, as that court had jurisdiction of the property, and power, under the statute, to award and decree alimony, under the circumstances, the question of property rights is *res judicata*, and the divorced wife is barred from any further claims on her former husband's property. (*Sprague v. Sprague*, 636.)

3. **MARRIAGE AND DIVORCE—COMMON-LAW MARRIAGE—FAILURE TO COMPLY WITH STATUTE.**—A contract of marriage good at common law is good notwithstanding the neglect of statutory forms relating to the subject and imposing a penalty, unless the statute itself contains express words availing the mar-

riage because of failure to conform to such statutory requirements. (*Renfrow v. Renfrow*, 850.)

4. MARRIAGE AND DIVORCE—COMMON-LAW MARRIAGE—WHAT CONSTITUTES.—To constitute a valid common-law marriage, it is not necessary that the parties shall have expressly agreed to live together as husband and wife, and the agreement to so live may be implied from their conduct and declarations. (*Renfrow v. Renfrow*, 850.)

5. MARRIAGE—PROOF OF CEREMONY—PRESUMPTION IN FAVOR OF.—Where there is proof of a marriage ceremony by an officer authorized to perform it under certain conditions, the presumption is in favor of the legality of his act, though the prerequisite conditions are not shown to have been satisfied. (*People v. Schoonmaker*, 560.)

MARSHALING.

See Debtor and Creditor, 1-3.

MASTER AND SERVANT.

1. MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT.—A servant, working under an entire contract, who voluntarily abandons his work without valid excuse before the end of the stipulated time, cannot recover for his services. (*Walsh v. Fisher*, 865.)

2. MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT—AMOUNT OF RECOVERY.—If a servant, engaged under an entire contract, quits the service before the end of his term, by reason of threats of strikers to do him bodily harm, he can recover only the value of his services after deducting the damages, if any, suffered by the master by reason of the breach of the contract. (*Walsh v. Fisher*, 865.)

3. MASTER AND SERVANT—BREACH OF ENTIRE CONTRACT—INSTRUCTIONS.—In an action to recover for services under an entire contract, a requested instruction to find against the servant if he quitted the service before the end of his term, pursuant to an agreement with others to strike, should not be qualified or confused by adding a clause as to his reason for quitting and the effect upon him of danger, or apparent danger, from the contemplated strike. The action of the court in adding such qualifying clause is reversible error. (*Walsh v. Fisher*, 865.)

4. MASTER AND SERVANT—DUTY TO INFANT EMPLOYÉ—WHETHER PERFORMED, WHEN QUESTION FOR JURY.—If, under all the circumstances, the question whether the master has performed his duty in pointing out to an infant employé the dangers and hazards of the employment and how to avoid them, in a manner suited to his youth and inexperience, is one about which opinions may reasonably differ, it is proper to submit such question to the jury for determination. (*Addicks v. Christoph*, 687.)

5. MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉ. A master, in instructing young servants in their work and in warning them against dangers to which it exposes them, must put such warning in such plain language as to be sure that they understand and appreciate the danger, and a failure to perform this duty renders the master liable for damages for any injury to a minor employé resulting therefrom. (*Addicks v. Christoph*, 687.)

6. MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉ. It is the duty of an employer of an infant to explain to him fully the hazards and dangers connected with the business, and to instruct him how to avoid them. (*Addicks v. Christoph*, 687.)

7. MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉES—DELEGATION OF DUTY.—The duty devolving upon a master to explain to a minor employé the hazards of the service, and to instruct him how to avoid them, cannot be delegated to a foreman, so as to exonerate the master from liability for failure to perform it, on the ground that such foreman was a fellow-servant with the injured minor employé. (*Addicks v. Christoph*, 687.)

8. MASTER AND SERVANT—DUTY TO MINOR EMPLOYÉES WORKING WITH DANGEROUS MACHINERY.—If young persons, without experience, are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazards of carelessness in their use, and if the employer neglects this duty, or gives improper instructions, he is liable for injury resulting from his neglect of duty. (*Addicks v. Christoph*, 687.)

9. MASTER AND SERVANT—RISKS ASSUMED BY MINOR EMPLOYÉES.—Minor employés assume by their contract of employment only those ordinary risks of their service which are obvious to them or have been pointed out in a manner suited to their youth and inexperience. (*Addicks v. Christoph*, 687.)

10. MASTER AND SERVANT.—SERVANT'S IMPLIED AUTHORITY is inferred to do all those things that are necessary for the protection of the property intrusted to him or for fulfilling the duty which he has to perform for his master. (*West Jersey etc. R. R. Co. v. Welsh*, 650.)

11. MASTER AND SERVANT—STIPULATED DAMAGES FOR BREACH OF CONTRACT.—A stipulation in a contract of employment that the damages for a breach thereof in quitting the service of contractors for the loading and unloading vessels and cars upon docks shall be the loss of fifteen days' wages is justified by the uncertainty as to the injury that may be caused thereby to the employer's business. Such stipulation is liquidated damages and not a penalty. (*Walsh v. Fisher*, 865.)

MECHANICS' LIENS.

1. MECHANIC'S LIEN — APPEAL—FINDING OF FACT.—A finding of a trial court, upon a question of fact, as to what allowances should be made for abatement by reason of deficiencies in a building, where it is sought to enforce a mechanic's lien thereon, will not be disturbed where the evidence is conflicting. (*West Virginia Bldg. Co. v. Saucer*, 822.)

2. MECHANIC'S LIEN—COMMENCES WHEN.—A mechanic's lien starts from the first moment when the work or delivery of material commences, even as to subsequent creditors, and certainly as to the owner. (*West Virginia Bldg. Co. v. Saucer*, 822.)

3. MECHANIC'S LIEN—CONTRACT CREATING.—To create a mechanic's lien, it is immaterial whether the contract is written or oral. (*West Virginia Bldg. Co. v. Saucer*, 822.)

4. MECHANIC'S LIEN—FILING—DEFICIENCIES IN WORK. Unimportant deficiencies in a building do not prevent a builder from filing his lien and recovering what is due him on it, less abatement for such deficiencies, where the contract for the work has been performed in all its material, substantial features. (*West Virginia Bldg. Co. v. Saucer*, 822.)

5. MECHANIC'S LIEN—MAY BE FILED, WHEN.—A builder may, before the completion of the work, file his lien, particularly where the work is to be paid for in installments, some of which are due before the work is completed. (*West Virginia Bldg. Co. v. Saucer*, 822.)

6. **MECHANIC'S LIEN—PLEADING.**—A BILL to enforce a mechanic's lien does not require very great particularity, because the account filed with the clerk, claiming the lien itself, has great effect. (*West Virginia Bldg. Co. v. Saucer*, 822.)

7. **MECHANIC'S LIEN — PLEADING — SUFFICIENCY.** — A BILL to enforce a mechanic's lien is sufficient where it sets out the contract, the work done under it, the amount thereof, the date when finished, and the filing of the account, which gives definite specifications of work, labor, and material. (*West Virginia Bldg. Co. v. Saucer*, 822.)

8. **MECHANICS' LIENS—PUBLIC BUILDINGS.**—A mechanic's lien against public buildings cannot be enforced by a sale of the property, when its use is necessary to the administration of governmental affairs. (*Noonan v. Hastings*, 419.)

9. **MECHANICS' LIENS—SUBCONTRACTOR'S LIEN AGAINST PUBLIC BUILDINGS.**—A subcontractor may assert a mechanic's lien against public buildings, so as to reach money in the hands of public authorities, in lieu of the improvements involved. The fund must stand in place of such property, and thus protect a subcontractor who gives notice as required by statute of the delinquency of the original contractor. (*Noonan v. Hastings*, 419.)

MERGER.

See Judgments, 5-7.

MISTAKE.

MISTAKE—REFORMATION OF INSTRUMENTS.—A court of equity may reform a note, if, in the execution thereof, the word "for," by the mutual mistake of the parties, was omitted after the signature of the president of the corporation for which the note was made. (*Prescott v. Hixon*, 291.)

MORTGAGES.

1. **MORTGAGES — ASSIGNMENT — NOTICE TO MORTGAGOR'S AGENT.**—Where all the business pertaining to a mortgage of a married woman's property is transacted by her husband as her agent, notice to him of the assignment of the mortgage constitutes notice to her. (*Cox v. Cayan*, 585.)

2. **MORTGAGE—ASSUMPTION BY MORTGAGOR'S GRANTEE.**—One who, by the terms of his conveyance from a mortgagor of premises, agrees to pay a mortgage thereon as part of the purchase price, makes it his own as effectually as if he had executed it himself. (*Farmers' Nat. Bank v. Gates*, 724.)

3. **MORTGAGE — FORECLOSURE — LITIGATION OF ADVERSE RIGHTS OF MORTGAGEES.**—Where a purchaser of upland bounded by a lake assumes a mortgage thereon as part of the purchase price, and later, having secured from the state a deed to the bed of such lake as swamp and overflowed land, mortgages the portion thereof immediately in front of the upland, in a suit to foreclose the first mortgage, the plaintiff has a right to have it litigated and determined whether there is any conflict between the two mortgages as to the land covered thereby. (*Farmers' Nat. Bank v. Gates*, 724.)

4. **MORTGAGE—FORECLOSURE — PARAMOUNT TITLE.**—A suit to foreclose a mortgage is not an appropriate proceeding in which to litigate questions of adverse or paramount title. (*Farmers' Nat. Bank v. Gates*, 724.)

5. MORTGAGES—FORECLOSURE — PARTIES DEFENDANT —REDEMPTION.—Where, upon a bill to foreclose a mortgage, a judgment creditor of the mortgagor is joined as a party defendant, a decree of foreclosure entered in such proceeding does not affect the statutory right of such judgment creditor to redeem from the sale. (*People v. Bowman*, 265.)

6. MORTGAGES—FORECLOSURE—REDEMPTION BY JUDGMENT CREDITOR OF MORTGAGOR.—Where land has been sold under foreclosure of a mortgage thereon, a judgment creditor of the mortgagor may redeem from the sale at any time within the statutory period allowed him, and he does not lose this right by securing a deed to the premises from the mortgagor, after the latter's period of redemption has expired. (*People v. Bowman*, 265.)

7. MORTGAGES—OMISSION OF NAMES OF MORTGAGORS. If a husband and wife sign a mortgage, the fact that their names do not appear in the body thereof does not vitiate the instrument, if enough appears from the whole thereof, outside of the signatures, to distinguish them as the mortgagors. (*Frederick v. Wilcox*, 925.)

See Corporations, 17; Crops; Homestead, 7; Negotiable Instruments, 6.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS.—The fact that the control of a city boulevard is vested by statute in the board of commissioners of parks and boulevards, rather than the common council, does not make the boulevard any less a city enterprise. A city may act through such agencies as the legislature directs. (*Burridge v. Detroit*, 582.)

2. MUNICIPAL CORPORATIONS—BONDS OF—JUDGMENT AGAINST—TAXATION TO PAY—MANDAMUS.—Under a statute providing that judgments against municipalities shall be assessed upon their taxable property, and the amount thereof added to the other municipal taxes, mandamus will lie to compel the levy of an assessment to pay a judgment against a city on its municipal bonds, valid when issued, although the rate of taxation is thereby increased beyond the limit fixed by the city charter. (*Hammond v. Place*, 543.)

3. MUNICIPAL CORPORATIONS—CONVERSION OF MONIES BY CITY TREASURER—LIABILITY.—A city is answerable to its warrant holders for the safe custody and proper payment, upon warrants, of money collected by its treasurer, upon an assessment for a street improvement, but which have been misapplied or converted by him. (*Pötter v. New Whatcom*, 135.)

4. MUNICIPAL CORPORATIONS—DISCHARGE OF FIREWORKS—INJURY—LIABILITY.—A municipal corporation is not answerable in damages to one who is injured in consequence of the discharge of firearms, squibs, rockets, and fireworks on one of its streets by private persons, although such acts were done with the knowledge and consent of the mayor, council, police, and other officers of the corporation. (*Bartlett v. Clarksburg*, 817.)

5. MUNICIPAL CORPORATIONS — EXACTING CONTRACT FOR FUTURE REPAIR OF STREETS.—Where a city has power to contract for street repairs demanded by present exigencies only, and to assess the cost thereof against abutting property, it has no power to incorporate in a street paving contract a condition that the contractor shall keep up repairs for a period of five years, because the effect of such a condition is to increase the total con-

tract price and to impose upon abutting property owners an added burden on account of anticipated repairs. (*Portland v. Bituminous Pav. Co.*, 713.)

6. **MUNICIPAL CORPORATIONS—FUTURE REPAIRS OF STREET.**—A city having power to repair its streets, when deemed expedient, and to assess the cost against abutting property, is empowered only to make provision for repairs demanded by present exigencies, and it is ultra vires for it to contract for keeping in repair streets or highways, made or to be made, as to levy the estimated cost of anticipated future repairs against the property of individuals. (*Portland v. Bituminous Pav. Co.*, 713.)

7. **MUNICIPAL CORPORATIONS—GOVERNMENTAL ACTION—INJURY—LIABILITY.**—A municipal corporation is not answerable in damages to one who is injured by its taking, or neglecting to take, strictly governmental action. (*Bartlett v. Clarksburg*, 817.)

8. **MUNICIPAL CORPORATIONS—HOW TO ENFORCE PAYMENT OF JUDGMENT AGAINST.**—Under the statute of Washington which relates to the enforcement of judgments against public corporations, and which provides that, in order to obtain payment, a certified transcript of the docket of such a judgment, including a memorandum of acknowledgment of satisfaction, must be presented to the officer authorized to draw orders on the treasury, who shall thereupon draw a warrant in favor of the judgment creditor, it is sufficient, to obtain the payment of a judgment against a town, to present to the mayor a transcript of the execution docket, and to the town clerk a transcript of the judgment itself, where each transcript shows a satisfaction, and to demand of them the issuance of a warrant. (*Smith v. Ormsby*, 110.)

9. **MUNICIPAL CORPORATIONS—INNOCENT PURCHASERS OF WARRANTS.**—A person who, for a valuable consideration and in good faith, purchases county warrants issued in payment of work done under an unlawful resolution of a board of supervisors, cannot, in a taxpayer's action, be required to make repayment of money received on such warrants, when such action is not commenced until a large part of the work has been completed and such warrants issued and paid. (*Webster v. Douglas County*, 870.)

10. **MUNICIPAL CORPORATIONS—LIABILITY FOR BOULEVARDS.**—A boulevard which furnishes to the traveling public all the conveniences of an ordinary street, and is equally inviting to the public, although an unusual space on either side is devoted to lawn, is a street or highway, within the meaning of a statute fixing the liability of municipal corporations for injuries received upon any public highway or street by reason of defective sidewalks. (*Burridge v. Detroit*, 582.)

11. **MUNICIPAL CORPORATIONS—LIABILITY OF, FOR UNAUTHORIZED ACT OF MAYOR—RATIFICATION.**—If the mayor of a city tears down the electric wires of a private company, which are lawfully upon the city's poles, the city is answerable for the damages caused, after it has ratified his act. (*Commercial etc. Co. v. Tacoma*, 103.)

12. **MUNICIPAL CORPORATIONS—LIMITATION OF AMOUNT OF HIGHWAY EXPENDITURES.**—A statute providing that county boards of supervisors "may annually levy, on the taxable property of the county, a county road tax, not exceeding eight thousand dollars, which shall be expended under their direction, in making culverts, grading, graveling, ditching, or otherwise improving such highways," fixes and limits the amount which may be expended in any one year to the amount previously raised by the tax. (*Webster v. Douglas County*, 870.)

13. MUNICIPAL CORPORATIONS — NEGLECT OR OMISSIONS—LIABILITY.—A city, like an individual, is answerable for neglect or omissions resulting in injury or damages. (*Potter v. New Whatcom*, 135.)

14. MUNICIPAL CORPORATIONS—NEGLIGENCE OF OFFICERS—INJURY—LIABILITY.—A municipal corporation is not answerable in damages to one who is injured by the wrongful acts or negligence of its officers or agents. (*Bartlett v. Clarksburg*, 817.)

15. MUNICIPAL CORPORATION — ORDINANCES, NECESSITY FOR PLEADING.—If a plaintiff, in an action for personal injuries and for injury to personal property, caused by obstructions, in the shape of stationary cars left on a public crossing within the limits of a city by a railway company, bases his right of action on the negligence of the defendant company in violating a city ordinance, he must set out so much of the ordinance as is relied on to support the cause of action; otherwise, the complaint is insufficient. (*Southern Ry. Co. v. Prather*, 949.)

16. MUNICIPAL CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACTS OF CITY OFFICERS.—The unauthorized acts of a city officer may be ratified otherwise than by a city ordinance. Ratification, in such cases, is a question of fact for the jury, and testimony as to any fact tending to prove it is admissible in evidence. (*Commercial etc. Co. v. Tacoma*, 103.)

17. MUNICIPAL CORPORATIONS—RIGHT TO QUARANTINE AND DISINFECT PREMISES—LIABILITY FOR COMPENSATION.—Neither a city nor its officers are liable for losses caused by quarantining and disinfecting premises infected with smallpox, if the only use made of such premises is such as is necessary for the proper care of infected patients found therein. (*Webb v. Detroit Board of Health*, 541.)

18. MUNICIPAL CORPORATIONS — RIGHT OF TAXPAYER TO TAKE APPEAL ON BEHALF OF.—The test of the right of a taxpayer, who is a member of a municipal corporation, to take an appeal from the determination of the trial court in a matter pending therein, by which the corporation is aggrieved, and from which its proper officers refuse or neglect to take such appeal, is not whether the taxpayer is directly injured by the determination of the trial court, but whether the corporation, as a whole, is injured in a matter in which the individual members thereof have a substantial interest. (*Estate of Cole*, 854.)

19. MUNICIPAL CORPORATIONS—STREET ASSESSMENT—VALIDITY.—An assessment to meet the expense of street repairs illegally contracted for by a city council is void. (*Portland v. Bluminius Pav. Co.*, 713.)

20. MUNICIPAL CORPORATIONS — TAXATION.—A municipality has no power to collect a tax upon property or a business so situated that it cannot receive any protection or benefit from it, although such business or property is within the city limits. In such case, there is no compensation for the property taken, and the legislature cannot extend or maintain the limits of a city for such purpose and which has such an effect. (*Kaysville City v. Ellison*, 772.)

21. MUNICIPAL CORPORATIONS—TAXPAYER'S RIGHT TO ACT FOR.—A taxpayer, acting on behalf of himself and others, has the right to enforce the cause of action of a municipal corporation, of which he is a member, when its officers neglect or refuse to perform their duty. (*Estate of Cole*, 854.)

22. MUNICIPAL CORPORATIONS — DOCTRINE OF ULTRA VIRES.—Neither the doctrine of estoppel, of ratification, nor of

bona fide holding can be successfully invoked to enforce against a municipal corporation its ultra vires contract, but where the infirmity of its contract is, not that it is ultra vires, but that it is technically irregular, or that there has been a nonobservance of some collateral and nonjurisdictional formality, a contrary rule will obtain where demanded by equity, and such contract be held to bind the municipality. (*Portland v. Bituminous Pav. Co.*, 713.)

23. MUNICIPAL CORPORATIONS—ULTRA VIRES CONTRACT—ACTION UPON.—Although an ultra vires contract of a municipal corporation has been fully executed on the part of the city, yet it cannot, by reason of the invalidity of the contract, recover damages for a breach thereof. The other contracting party is not estopped to set up the invalidity of the contract in defense of an action thereon. (*Portland v. Bituminous Pav. Co.*, 713.)

24. MUNICIPAL CORPORATIONS—VALID CONTRACTS OF TAXATION TO PAY.—The validity of a contract made by a municipal corporation necessarily involves the right to raise by taxation the amount which it has agreed to pay, and in such case the poverty of the city is no defense. (*Hammond v. Place*, 543.)

NEGLIGENCE.

1. NEGLIGENCE—ACTION FOR DEATH.—In the absence of statute, no cause of action exists for wrongfully causing the death of a human being. (*Perham v. Portland Electric Co.*, 730.)

2. NEGLIGENCE—ACTION FOR DEATH—NO SURVIVING RELATIVES OR CREDITORS.—Where a cause of action for wrongful death is created in favor of the personal representative of one whose death was wrongfully caused, it is not necessary for a personal representative to set forth in his complaint in such an action that deceased left surviving relatives or creditors, although the statute directs that the amount recovered shall become a part of the estate of the deceased, to be administered upon as other personal property. (*Perham v. Portland Electric Co.*, 730.)

3. NEGLIGENCE—ACTION FOR DEATH—STATUTORY CONSTRUCTION.—The fact that the damages recoverable under a statute allowing an action for wrongful death, become, under such statute, assets of the estate of the person whose wrongful death is sued for, is immaterial to the determination whether the statute is simply a survival statute or one creating a new cause of action. (*Perham v. Portland Electric Co.*, 730.)

4. NEGLIGENCE—ACTION FOR DEATH—STATUTORY CONSTRUCTION.—Where a statute creating an action for death directs that the amount recovered in such an action shall become assets of the "estate" of the deceased person, the word "estate" is not used in its technical sense of meaning the property left by him, but simply to distinguish between the measure of damages under such statute from that prevailing under statutes similar to Lord Campbell's act, in which the recovery is for the benefit of some designated individual. (*Perham v. Portland Electric Co.*, 730.)

5. NEGLIGENCE—BASIS FOR DAMAGES.—In an action by the next of kin to recover damages, for a death caused by negligence at a railway crossing, a sufficient basis for an award of damages may be found in the character, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries. (*Missouri Pacific Ry. Co. v. Moffatt*, 343.)

6. ARCHITECTS—CARE AND SKILL REQUIRED.—When an architect, in the preparation of plans and specifications, has exer-

cised that degree of care, skill, and judgment common to his profession, he has done all that the law requires. He is not then liable for damage caused by defects in his plans. (*Chapel v. Clark*, 587.)

7. NEGLIGENCE OF CLERK OF UNITED STATES COURT IN FURNISHING FALSE INFORMATION—DAMAGES.—If an attorney in a United States court case is, in response to his inquiry, notified by the clerk of court that judgment has not been entered when, in fact, it has been entered, and the attorney, who, by agreement, is liable for the costs and expenses of suit, is notified that judgment has been subsequently entered on a certain date, which statement is also untrue, and immediately after such notice incurs useless expense in prosecuting an appeal, which is dismissed because not taken in time, the clerk is answerable to such attorney for the damage sustained by reason of the false information as to the latter's first inquiry, especially where the clerk is authorized to charge a fee for giving information from his records. His negligence, in such a case, is the proximate cause of the damage sustained by taking the appeal. (*Selover v. Sheardown*, 626.)

8. NEGLIGENCE — CONTRACTORS—CARE REQUIRED OF. Contractors who are constructing buildings and making excavations along the streets of a city are required to exercise such degree of care as is reasonably proportionate to the danger of risk or probability of risk to others involved in each particular case that may arise out of the nature and character of the acts creating such risk or danger. (*Baumeister v. Markham*, 397.)

9. NEGLIGENCE — CONTRACTORS — EXCAVATION — NUISANCE.—If contractors, while constructing a building, make an excavation which is unauthorized and dangerous, it becomes, ipso facto, a nuisance, and they are bound in any event to keep it clear from any danger to others. (*Baumeister v. Markham*, 397.)

10. NEGLIGENCE — CONTRACTORS — EXPOSED EXCAVATION.—If a person exercising ordinary care is injured by falling into an exposed and unguarded excavation, made by a contractor while constructing a building, it is no defense to show that such excavation was covered and guarded five or six hours before the accident, there being no evidence as to how or by whom it was, in the meantime, exposed and unguarded. (*Baumeister v. Markham*, 397.)

11. NEGLIGENCE — CONTRACTORS AND SUBCONTRACTORS—JOINT LIABILITY.—If joint supervision and co-operation of the principal contractor of a building on a highway and of his subcontractor of a portion of it becomes necessary and is exercised, a joint obligation to the public exists, and joint liability is fixed for personal inquiry to a stranger, resulting from an act done or duty omitted in a negligent manner by the subcontractor during the prosecution of the business. (*Baumeister v. Markham*, 397.)

12. NEGLIGENCE—CONTRIBUTORY—ELECTRIC WIRES.—A workman whose duty it is to work where contact with electric wires is unavoidable, and to whom the owner of the wires owes a duty to exercise due care and caution to protect him from injury, is justified in assuming that such duty has been performed; and where, to such workman's nonexpert knowledge, there is no apparent danger from contact with the wires, he cannot be deemed guilty of contributory negligence, as a matter of law, if, by coming in contact with such wires, he is killed. (*Perham v. Portland Electric Co.*, 730.)

13. NEGLIGENCE, CONTRIBUTORY—WHEN A QUESTION FOR THE JURY—CROSSING STREET RAILWAY TRACK.—Whether a person who had his horse and buggy injured by an elec-

tric-car while he was attempting to cross a street railway track was guilty of negligence, contributing proximately to the injury, is a question for the jury, where the attempt to cross was made at a place where the plaintiff had a right to cross. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

14. NEGLIGENCE—DANGEROUS MACHINERY—UNSE-CURED CAR—INJURY TO CHILD.—If a railroad company leaves a platform-car, with no machinery or any brake about it, unblocked upon its track on a highway, in such condition that it may be moved by the united strength of several children, it is not guilty of negligence which will render the company liable to a trespassing child playing on or about the car. (*Kaumerer v. City Electric Ry. Co.*, 525.)

15. NEGLIGENCE—DEFENSE OF DAMAGE TO DEFEND-ANT.—In an action for damage resulting from defendant's negli-gence, in the absence of intervening cause, the fact that the de-fendant may have suffered a loss of his own property through the negligent act complained of does not render him any less liable to the plaintiff for a loss ensuing to him through the neglect. (*Lillibridge v. McCann*, 553.)

16. NEGLIGENCE—DEFINITION.—Negligence is the absence of such care as persons of ordinary prudence are expected to exer-cise under like circumstances. (*Lillibridge v. McCann*, 553.)

17. NEGLIGENCE—WHAT IS—ELECTRIC WIRES.—"Care" and "diligence," when used in discussing negligence, are relative terms, deriving their significance from the circumstances in hand. When applied where people are dealing with electricity, they mean the highest care and vigilance possible under the existing condi-tion of science. (*Perham v. Portland Electric Co.*, 730.)

18. NEGLIGENCE—ELECTRIC WIRES.—A prima facie case of negligence is made out against an electric company, where it ap-pears that, knowing that a railroad bridge over which it placed its wires must, from time to time, require repairs, and that, owing to the high voltage of electricity carried, the wires could not be so insulated as to render them safe to persons coming in contact with them. It nevertheless so placed the wires that persons could not make such repairs without coming in deadly contact therewith. (*Perham v. Portland Electric Co.*, 730.)

19. NEGLIGENCE—EVIDENCE—MENTAL CAPACITY OF INFANT.—If, in an action by an infant to recover for personal in-jury caused by negligence, his contributory negligence is made an issue, his brightness and intelligence are important considerations, and proof of them previously received on cross-examination with-out objection should not be stricken out. To thus strike out such proof is error. (*Atchison etc. Ry. Co. v. Potter*, 385.)

20. NEGLIGENCE—FIRE CAUSED BY—QUESTION FOR JURY.—Where, in an action for damage by fire communicated to plaintiff's premises from defendant's it is alleged that the fire was started through defendant's negligence, and it is shown that he, previous to the fire, went into his barn, lighted his pipe and lay down to smoke in the midst of combustible materials, that he fell into a doze and his pipe into the combustible material, that a fire was started which was communicated to and destroyed plaintiff's property, this evidence is such as to require the submission of the question of the origin of the fire to the jury, and will support their finding that the fire was ignited by the pipe. (*Lillibridge v. Mc-Cann*, 553.)

21. NEGLIGENCE—INJURY AT RAILWAY CROSSING.—The fact that a man killed on a railway crossing was careful and sober,

and had previously exercised due care there, tends to repel any inference of negligence on his part arising from the mere fact that he was upon the track and struck by a locomotive. (*Missouri Pac. Ry. Co. v. Moffatt*, 343.)

22. NEGLIGENCE—INSTANTANEOUS DEATH.—The Oregon statute giving to the personal representatives of a person whose death was caused by the wrongful act of another, a right of action against that other for such death, is not a "survival statute," but creates a new cause of action, and therefore it makes no difference in the right to maintain the action whether the death of the deceased was instantaneous or not. (*Perham v. Portland Electric Co.*, 730.)

23. NEGLIGENCE — INSTRUCTIONS — REFUSAL OF—ACT NOT COVERED BY PLEAS.—An instruction which predicates the defendant's right to a verdict on an alleged act of contributory negligence should be refused where such act is not covered by the pleas. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

24. NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—For an injury inflicted, producing damage, by two or more wrongdoers, an action may be maintained by the injured person either against any one or all of them, as the liability is joint and several. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

25. NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—If an injury is produced, not by design, but by the concurrent acts of negligence of two or more persons, although their acts are distinct and separate, yet they incur a joint and several liability for the injury which they produce. If the injured person should sue one of the tort fessors, and receive satisfaction from him, he cannot recover from the other wrongdoers. He is entitled to be compensated but once for the injury. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

26. NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—While several may be guilty of several and distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor, and the action is not to recover for the negligent act or acts, but for the injury which they produce. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

27. NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—If an employer, though a common carrier, has been guilty of negligence in failing to discharge some duty imposed on it, and its agent or employé has been guilty of separate acts of negligence, all concurring in producing an injury, both the carrier and its agent or employé are jointly and severally liable therefor. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

28. NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—One person is not liable for the effect of the negligent acts of another unless he is guilty of negligence which, together with the negligence of such other, produces an injury, and then he is jointly and severally liable for the injury produced. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

29. NEGLIGENCE—JOINT AND SEVERAL LIABILITY.—If a person suffers injury from the joint negligence of two parties, and both are negligent in a manner contributing to the injury, both are liable jointly and severally, although one of them is a common carrier. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

30. NEGLIGENCE OF MINISTERIAL OFFICER IN DISCHARGE OF SPECIAL DUTY.—If an individual suffers injury from the negligence of a ministerial officer in the discharge of a special duty, he has a right of action founded, not on contract, but on breach of duty. (*Selover v. Sheardown*, 626.)

81. NEGLIGENCE—NAME OF NEGLIGENT AGENT NEED NOT BE PLEADED.—There is no rule of pleading which requires a complaint in an action against a railway company, to recover damages for injuries to one not an employé, to state the name of the person whose negligence is alleged to have caused the injury. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

82. NEGLIGENCE—PLEADING AND PRACTICE.—A petition alleging negligence in general terms may be amended so as to set forth the facts, although the period of limitations for the bringing of the action has expired when the amendment is made. (*Missouri Pac. Ry. Co. v. Moffatt*, 843.)

83. NEGLIGENCE—PROXIMATE CAUSE.—A shipper of lumber who negligently loads a car is not liable to a railway brakeman who is injured by the shifting of the lumber, when the accident happens after it has become the duty of the railway company to provide for the inspection of the car. In such case, there is the intervention of an independent human agency between the shipper's negligence and the accident, which renders such negligence a remote and not a proximate cause. (*Fowles v. Briggs*, 537.)

84. NEGLIGENCE—PROXIMATE CAUSE—INTERVENING CAUSE.—Where defendant's negligence was the proximate cause of a fire on his own premises which was communicated and caused damage to plaintiff's property, the fact that the state of the wind at the time aggravated the damage to plaintiff, and encouraged the spread of the fire more than it would have done under ordinary circumstances, does not constitute an intervening cause, relieving defendant from liability. (*Lillibridge v. McCann*, 553.)

85. NEGLIGENCE—SPECIAL DAMAGES—IMMORAL CONTRACT.—In an action to recover for personal injury caused by negligence, an instruction that plaintiff cannot recover special damages on account of a broken leg, if it is part of her business to go upon the theatrical stage and exhibit her legs in such manner as is indecent in fact and immoral in its tendencies, or on account of her loss of opportunity to earn money in such employment, is properly refused. (*Baumeister v. Markham*, 397.)

86. NEGLIGENCE—STARTING OF FIRES.—The owner of one building taking fire from another, which is set on fire through the negligence of another person, has a cause of action against that other for the injury, where the negligence is the proximate cause of the injury. (*Lillibridge v. McCann*, 553.)

87. NEGLIGENCE, WANTON, WHAT IS.—In an action to recover damages of a railway company for running its train upon and against a child on its track it is proper to instruct the jury that: "What is meant, in this case, by wanton negligence is the conscious failure on the part of defendant to use reasonable care, under the circumstances, to avoid the injury after discovering the danger of the child, if they find there was such failure, and injury resulted therefrom." (*Alabama etc. R. R. Co. v. Burgess*, 943.)

88. NEGLIGENCE—WHEN NOT ACTIONABLE.—A party may be guilty of negligence, and, if no injury results therefrom, no action can be maintained therefor. (*Pugh v. Chesapeake etc. Ry. Co.*, 392.)

See Bailments, 1, 2; Carriers, 5, 6; Municipal Corporations, 13, 14; Railroads, 1, 7, 12-15, 17, 19, 27; Waters, 9-11.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS EXECUTED IN VIOLATION OF STATUTE.—As a general rule, one who executes a negoti-

able note, knowing it is the subject of barter and sale in the commercial world, and does not put into it any words which give warning to others not to buy it, is estopped to make a defense after it has passed into the hands of a bank; but where the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so, no matter into whose hands it may pass. (*Bohon v. Brown*, 420.)

2. **NEGOTIABLE INSTRUMENTS—INDORSEMENT PRIOR TO PAYEE.**—Whether the contract of one whose indorsement on a note, made prior to the payee's, is that of a second indorser, or of a maker or surety, is a question for the jury, when there is evidence tending to sustain both conclusions. (*Cadwallader v. Hirschfeld*, 671.)

3. **NEGOTIABLE INSTRUMENTS—INDORSEMENT PRIOR TO PAYEE'S.**—Although the indorsement of a person on a note, prior to that of the payee, standing alone, does not imply any contract on the part of the indorser on account of such signature, yet the note, upon proof of its execution and indorsement, is admissible in evidence as the basis of proof of the real contract of the parties thereto. (*Cadwallader v. Hirschfeld*, 671.)

4. **NEGOTIABLE INSTRUMENTS—LIABILITY OF INDIVIDUAL SIGNER OF CORPORATE NOTE.**—If a note is signed by an individual maker with such words as "president," "manager," or "secretary," immediately following the name, they are, in the absence of a corporate seal, or an apparent intention in the body of the instrument to bind the corporation alone, considered as merely descriptive of the person of the maker, and the note must be held to be the obligation of the person signing it. (*Prescott v. Hixon*, 291.)

5. **NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSER—PRESENTMENT.**—Presentment for payment to the receiver pendente lite of an insolvent corporation is insufficient to bind an indorser of negotiable paper of which the corporation is maker. (*Jackson v. McInnis*, 755.)

6. **NEGOTIABLE INSTRUMENTS—MORTGAGE AND NOTES.** A mortgage of real estate, and the promissory notes secured thereby, are negotiable. (*Cox v. Cayan*, 585.)

7. **NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE TO VARY.**—If a note is clear and unambiguous in its terms and certain in its legal effect, parol evidence is not admissible to change or vary it. It is immaterial what the parties to the note believed as to the legal effect of the form in which they contracted. (*Prescott v. Hixon*, 291.)

8. **NEGOTIABLE INSTRUMENTS—"PEDDLER'S NOTE"—PLEADING.**—If the statute requires that the words "peddler's note" shall be written across the face of all notes executed for articles sold by peddlers or itinerant persons, and payment of a note in suit is resisted on the ground that it is a "peddler's note," and that the statute has not been complied with, an answer which falls to allege that the payee of the note sued on was a peddler or itinerant person at the time of the sale of the article or execution of the note in contest is insufficient and subject to demurrer. (*Bohon v. Brown*, 420.)

9. **NEGOTIABLE INSTRUMENTS—PRESENTMENT.**—In order to bind the indorser of a negotiable instrument, the presentment for payment must be made to the person whose duty it is to pay, or to an agent or person duly authorized to act in the premises. (*Jackson v. McInnis*, 755.)

See Checks; Garnishment, &c.

NEW TRIAL.

See Trial, 5.

NONRESIDENTS.

See Attachment, 3-7; Garnishment, 5; Taxes, 7.

NOTICE.

See Attorney and Client, 5; Judicial Sales, 2; Mortgages, 1; Taxes, 9, 10; Trusts, 2.

OCCUPANCY.

See Adverse Possession, 2; Cotenancy, 5, 7; Homesteads, 5, 6.

OFFICERS.

1. **OFFICERS—ACTION BY TAXPAYERS AGAINST TO RESTRAIN ILLEGAL PAYMENTS—LACHES.**—A taxpayer's suit to enjoin an illegal expenditure of money upon highways, not commenced until after part of the work has been done and paid for, does not show such laches as bars the action as to future illegal work and payments. (*Webster v. Douglas County*, 870.)

2. **OFFICERS—ACTION BY TAXPAYERS AGAINST TO RESTRAIN ILLEGAL PAYMENTS.**—A taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes, and may also, under proper circumstances, compel public officers, and even third persons, to repay into the public treasury money already paid out illegally. (*Webster v. Douglas County*, 870.)

3. **OFFICERS—LIABILITY FOR BREACH OF INJUNCTION.** County officers who assist in the violation of an injunction, either by voting the issuance of orders or counter-signing them, or by paying out money thereon, as well as the recipients of such money, to the extent of the amounts respectively received by them, may be compelled, in an action by a taxpayer, to repay to the county treasury the sums thus wrongfully paid out. (*Webster v. Douglas County*, 870.)

4. **OFFICERS—LIABILITY FOR ESCAPE OF PRISONER UNDER EXECUTION.**—In an action against a sheriff to recover for voluntarily permitting a defendant under execution in a bastardy proceeding to escape, the insolvency of such defendant, or his inability to pay or replevy the judgment against him, does not reduce the damages against the officer. (*Hoagland v. State*, 298.)

5. **OFFICERS—LIABILITY FOR ESCAPE OF PRISONER UNDER EXECUTION—JUDGMENT PAYABLE IN INSTALLMENTS.**—If a judgment against a defendant in a bastardy proceeding is payable in annual installments, a judgment against the sheriff for voluntarily permitting such defendant to escape while under execution, should be for the same amount, payable in the same manner, as the original judgment. (*Hoagland v. State*, 298.)

6. **OFFICERS—LIABILITY FOR ESCAPE OF PRISONER UNDER FINAL PROCESS.**—If a sheriff voluntarily permits a prisoner to escape under execution in a bastardy prosecution, the return of the prisoner to custody or his rearrest without the consent of the judgment plaintiff does not relieve the sheriff from liability for the escape. (*Hoagland v. State*, 298.)

7. **OFFICERS—LIABILITY FOR PERMITTING DEFENDANT UNDER EXECUTION TO ESCAPE.**—A sheriff who voluntarily per-

mits a defendant under execution in a bastardy proceeding to escape as not required to pay the judgment at the hazard of being committed to jail like the principal defendant. (*Hoagland v. State*, 298.)

8. ESCAPE—RIGHT OF OFFICER TO RETAKE PRISONER UNDER EXECUTION.—If a prisoner, permitted by the sheriff to be at large escapes, the escape is voluntary in legal contemplation. The sheriff, after such escape from custody under final process, cannot retake the prisoner or receive him back without the plaintiff's consent. (*Hoagland v. State*, 298.)

9. OFFICERS—LIABILITY OF FOR MONEY WRONGFULLY PAID OUT.—Money paid out by public officers in direct violation of law may be recovered from the officials themselves, and from the recipients thereof in actions seasonably brought by taxpayers on behalf of the public, especially when the transaction is marked by haste, fraud, collusion, or concealment. (*Webster v. Douglas County*, 870.)

See Executions, 2; Interest; Municipal Corporations, 14, 16; Negligence, 30; Process.

OPINIONS.

See Appeal, 3; Evidence, 4.

ORDINANCES.

See Municipal Corporations, 15; Railroads, 9.

PARENT AND CHILD.

PARENT AND CHILD—DAMAGES FOR DEATH—RIGHT OF ACTION.—The right of a parent to recover damages for the wrongful death of a child is purely statutory, and an action to recover such damages cannot be maintained by a woman who is not the mother of the child killed, and who has not legally adopted it, although it was given to her in its early infancy, and she has always maintained and treated it as her own. (*Citizens' Street Ry. Co. v. Cooper*, 319.)

PARTIES.

1. PARTIES—APPEAL—RECITING WRONG PARTY PLAINTIFF IN BOND—EFFECT OF.—If a suit is brought, in a justice's court, in the name of "A, agent for B," and judgment is rendered in favor of "A, agent for B," the fact that the appeal bond recites a judgment in favor of B does not authorize the suit to be prosecuted, on appeal, in the name of B, as plaintiff, instead of A, the real plaintiff. (*Hallmark v. Hopper*, 900.)

2. PARTIES.—A SUIT BROUGHT IN THE NAME OF "A, AGENT FOR B," is the suit of A, and not of B. The words, "agent for B," are merely descriptive of the person, A, and are superfluous. (*Hallmark v. Hopper*, 900.)

See Actions, 2; Fraudulent Conveyances, 4, 5; Mortgages, 5.

PARTIES IN PARI DELICTO.

See Equity, 4.

PARTNERSHIP.

1. PARTNERSHIP—ESSENTIALS.—Neither articles of partnership nor written contracts defining the interests, rights, and obligations of the parties are essential to the existence of a partnership. (*Jones v. Davis*, 354.)

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2. PARTNERSHIP IN REAL ESTATE.—If several persons purchase land for the purpose of sale and profit only, and they have a community of ownership, power, and profit and loss, they must be treated as partners, no matter what they call themselves. (*Jones v. Davis*, 354.)

3. PARTNERSHIP IN REAL ESTATE.—If several persons purchase real estate as a speculation, they become partners, and the mere fact that the title was taken in the name of one of them, who executed a mortgage for the unpaid purchase money, cannot change the relationship of the parties or the ownership of the property. (*Jones v. Davis*, 354.)

4. PARTNERSHIP IN REAL ESTATE.—If persons join together and purchase land for the purpose of sale and profit only, it is immaterial in whose name the purchase is made or the title taken, as in such case the property is to be deemed to be partnership property, and the parties are entitled to the rights and subject to the liabilities of partners. (*Jones v. Davis*, 354.)

5. PARTNERSHIP IN REAL ESTATE.—If persons join together and purchase land for the purpose of sale and profit only, the land must be regarded in equity as personal property and the statute of frauds has no application to the transaction. (*Jones v. Davis*, 354.)

6. PARTNERSHIP IN REAL ESTATE—LIABILITY OF INCOMING PARTNER.—If several persons purchase land for the purpose of sale and profit only, and one of them sells his share to an outsider, who, with full knowledge, contributes to the payment of interest on the unpaid purchase money, and also to taxes and incidental expenses, and shares in the proceeds of sales, he is liable as a partner for the payment of the unpaid purchase money due on the land. (*Jones v. Davis*, 354.)

7. PARTNERSHIP MAY EXIST FOR A SINGLE VENTURE or undertaking, such as the purchase of land for speculation. (*Jones v. Davis*, 354.)

See *Fraudulent Conveyances*, 6; *Sheriffs*, 2.

PATENT RIGHTS.

See *Statutes*, 9.

PAYMENT.

PAYMENT, VOLUNTARY—WHAT IS. AND EFFECT OF.—A voluntary payment made by a garnishee to an attaching creditor is no protection to the garnishee as against his own creditor, and any payment not made under execution will be regarded as voluntary, except where the law authorizes the court to require the garnishee to pay the money into court, in which event the payment will be regarded as having the same legal effect as a payment under execution. (*Brewer v. Hutton*, 804.)

See *Attachment*, 7; *Bonds*; *Municipal Corporations*, 8; *Officers*, 1, 2; *Sales*, 2; *Suretyship*, 3; *Trusts*, 5.

PLACE OF TRIAL.

See *Constitutions*, 4.

PLEADING.

1. PLEADING—AMENDMENT CHANGING PARTY PLAINTIFF.—An amendment which works an entire change of party plaintiff is not allowable. Hence, if an action is brought in the

name of "A, agent for B," an amendment by which the action would be made to stand in the name of B, as plaintiff, would work an entire change of party plaintiff, and is not allowable. (*Hallmark v. Hopper*, 900.)

2. PLEADING — AMENDMENT — JUSTICES' COURTS.—The rule prohibiting an amendment which works a change of the sole party plaintiff applies to actions begun before justices of the peace and appealed to other courts. (*Hallmark v. Hopper*, 900.)

3. PLEADING — ANSWERING BUT ONE OF SEVERAL COUNTS—DEMURRER.—If a complaint contains several counts, and a plea addressed to the whole complaint answers but one of the counts, a demurrer to the plea should be sustained. (*Smith v. Heineman*, 150.)

4. PLEADING.—DEFENSE OF STATUTE OF FRAUDS may be relied upon, though not pleaded in reply to a counterclaim, under a statute providing that "the statement of any new matter in the answer in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party." (*Steed v. Harvey*, 789.)

5. PLEADING, DESCRIPTION IN EJECTMENT.—In ejectment, where parol evidence is necessary to identify the premises conveyed by deed, the complaint should not follow the description in the deed, but should aver the facts established by the extrinsic proof, so that the judgment, following the complaint, may be more certain and definite as to the land recovered. (*Cottingham v. Hill*, 923.)

See Damages, 5; Estoppel, 5; Executions, 5; Husband and Wife, 2; Insurance, 7; Limitation of Actions, 5-8; Mechanics' Liens, 6, 7; Municipal Corporations, 15; Negligence, 23, 32; Negotiable Instruments, 8; Railroads, 8, 9, 15, 16.

PLEDGE.

1. PLEDGE—POWER OF PLEDGEE—SHARES OF STOCK—CONVERSION.—Where a pledgor of stock certificates as collateral security is able to designate specifically the shares deposited, he is entitled to have the identical shares returned, or, in default of such return, to recover their value in trover. (*Allen v. Dubois*, 557.)

2. PLEDGE—RETURN OF PROPERTY—SHARES OF STOCK—PRESUMPTION.—Where a pledgor of shares of stock is unable to specifically designate the shares pledged, the law will presume that shares in the pledgee's hands from time to time after the pledge were the identical shares deposited. (*Allen v. Dubois*, 557.)

See Executors and Administrators, 7.

POLICE POWER.

See Statutes, 9, 13.

PRACTICE.

See Equity, 11, 12; Negligence, 33; Trial, 2, 3.

PROBATE SALE.

See Judicial Sales, 4.

PROCESS.

PROCESS—OFFICER'S RETURN AS EVIDENCE.—An officer's return of service of process is prima facie evidence of the material facts recited therein. (*Huntington v. Crouter*, 726.)

See Garnishment, 5; Jurisdiction, 1.

PUBLIC LANDS.

PUBLIC LANDS—BED OF LAKE—RIGHTS IN.—A lake and its bed, the title to which is in the state, are free to all to enter upon or any part thereof for any purpose not unlawful, and no one may claim any privilege there superior to others. No priority of right to any particular spot or place in such lake bed can be held by any one against the entry by others, for grass cutting or other lawful purposes. (*Lapp v. Frazier*, 493.)

See Homesteads, 7.

PUBLIC POLICY.

See Contracts, 9.

QUARANTINE.

See Boards of Health, 1-3; Municipal Corporations, 17; Statutes, 10-14.

RAILROADS.

1. RAILROADS—CROSSING TRACK OF.—IT IS NOT NEGLIGENCE, in itself, for one to cross over a railroad track wherever he may have occasion to do so, whether in the open country or within the limits of a town or village, and one who, for the purpose of crossing the track, goes upon it with care and caution and with all the assurance which his senses, properly exercised, can give him that it is safe to do so, may recover if he is injured by the railway company from some cause against which he could not guard. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

2. RAILROADS—DUTY OF, TOWARD ANIMALS, IN ONE'S CUSTODY, ON TRACK.—When a horse, in the custody of a person, is on a railway track, and its presence becomes known to the company, it thereafter owes the animal the same duty as to care that it would owe to a human being on the track. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

3. RAILROAD COMPANIES—DUTY TO PERSON RIDING ON PASS.—In case of a person riding on a free pass, the carrier is under the same obligations, as to care and vigilance, as he is to a passenger for hire, and as to a passenger to whom a pass is given, based upon any consideration, he cannot absolve himself from liability for injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against public policy and void. (*Williams v. Oregon Short Line R. R. Co.*, 777.)

4. RAILROAD COMPANIES—IMPLIED AUTHORITY OF EMPLOYÉ.—A railroad brakeman, or other employé, on a freight train, has implied authority to eject a trespasser therefrom. (*West Jersey etc. R. R. Co. v. Welsh*, 659.)

5. RAILROAD COMPANIES—IMPLIED AUTHORITY OF EMPLOYÉS.—The implied authority of a railway brakeman, or other employé on a freight train, to eject trespassers therefrom is not overcome by express authority given by the company to freight conductors to exclude trespassers from its trains and not to permit unauthorized persons to ride thereon. (*West Jersey etc. R. R. Co. v. Welsh*, 659.)

6. RAILROADS—INJURY CAUSED BY OBSTRUCTION OF STREET CROSSING.—It is not negligence per se to attempt to drive over a public street crossing, obstructed by stationary cars of a railroad company. Hence, a complaint to recover damages for personal

Injuries sustained, and for damages done to personal property, in making such an attempt, within the limits of a city, states a good cause of action, but subject to the defense of contributory negligence, where it is alleged that the defendant railway company had a double track; that the plaintiff found the crossing obstructed by cars, contrary to the city ordinances; that on one side its cars extended from one direction into the crossing; that on the other side its cars extended into the crossing from an opposite direction; that there was sufficient space left of the public crossing over which the plaintiff could pass, without leaving the highway, by driving in front of the cars on one side, and, by making a short turn between the cars, going in front of the cars on the other track; but that, in making such short turn, the wheels on one side of his buggy struck against the iron railway track, throwing the plaintiff out of his buggy, and thus causing injury to person and property. (Southern Ry. Co. v. Prather, 949.)

7. RAILROADS—INJURY CAUSED BY OBSTRUCTION OF STREET CROSSING—STATIONARY CARS—NEGLIGENCE—PLEADING.—If a railway company, contrary to a city ordinance, obstructs a public street crossing by leaving stationary cars upon it, and one who has been injured in person and property while attempting to go over such crossing brings an action to recover damages from the company for such injuries, an averment that they were caused by the "wantonness, recklessness, or willfulness of defendant's agents or servants in failing or refusing to remove" the cars from the crossing, charges no more than simple negligence, where it is not fairly inferable from the facts averred that the defendant placed the cars on the crossing for the purpose of causing injury, or failed to remove them from any reckless indifference to consequences, being conscious that such failure would probably result in injury. (Southern Ry. Co. v. Prather, 949.)

8. RAILROADS — INSUFFICIENT PLEADING OF ORDINANCE AS TO CARS LEFT IN STREET.—In an action to recover damages for personal injuries received while crossing a street, obstructed by stationary railway cars, an allegation that a city ordinance, at the time, prohibited railroad companies from allowing cars to stand in streets longer than five minutes at a time is not a sufficient pleading of the ordinance. (Southern Ry. Co. v. Prather, 949.)

9. RAILROADS — INSUFFICIENT PLEADING OF ORDINANCE AS TO DELAY OF FIREMEN.—If a person, in going to a fire, is injured while crossing a street which is obstructed by stationary railway cars, and brings an action against the railway company, basing it upon the provision of a city ordinance which declares that "no person shall obstruct any street in any manner calculated to delay any company in carrying their apparatus to or from any fire," the complaint is insufficient, where there is no allegation that any company was obstructed in carrying its apparatus to or from a fire, and it does not show that the alleged injury resulted from the cause that any such company was thereby obstructed. (Southern Ry. Co. v. Prather, 949.)

10. RAILROAD COMPANIES—LIABILITY FOR ASSAULT ON PASSENGER BY EMPLOYE.—A railroad company, or other common carrier, is liable for a malicious assault made by its employé upon a passenger, although such act is a wanton and willful trespass. The liability of the carrier in such case rests upon the principle that it has engaged to perform certain duties and has selected its own employés, and hence an assault by an employé is a breach of duty of the carrier to the passenger. (Haver v. Central R. R. Co., 647.)

11. **RAILROAD COMPANIES—LIABILITY FOR EXPULSION OF TRESPASSER FROM TRAIN.**—If injury to a trespasser upon a freight train is caused by the use of excessive and unnecessary or inappropriate force by a train brakeman in ejecting him therefrom, the company is liable therefor. (*West Jersey etc. R. R. Co. v. Welsh*, 659.)

12. **RAILROAD COMPANIES — NEGLIGENCE — DUTY TO LOOK AND LISTEN.**—Failure of a passenger to look and listen for approaching trains when crossing a track in passing from train to station, is not necessarily negligence. The question is one for the jury. (*Atlantic City R. R. Co. v. Goodin*, 652.)

13. **RAILROAD COMPANIES — NEGLIGENCE PRESUMED FROM ACCIDENT.**—Proof of an accident resulting in injury to a passenger, caused by the derailment of a street-car, is sufficient to charge the company with negligence, and to cast upon it the burden of proof to show that the injury was caused without its fault. (*Bergen County Traction Co. v. Demarest*, 685.)

14. **RAILROAD COMPANIES—NEGLIGENCE OF STREET RAILWAY IN STARTING CAR.**—If a street-car is negligently started before a passenger attempting to alight therefrom has safely left it, and the passenger is then seized with an attack of dizziness preventing him from holding on, in consequence of which he falls off and is injured, the company is liable. (*Leavenworth Electric R. R. Co. v. Cusick*, 374.)

15. **RAILROAD COMPANIES—NEGLIGENCE—PLEADING.**—In an action to recover for personal injury received through negligence by a railroad company, the plaintiff is not required to aver all of the physical injuries which he sustained, or which may have resulted from or have been aggravated by the wrongful act of the defendant. If such injuries can be traced to the act complained of, or are such as would naturally follow from it, they need not be specifically alleged. (*Williams v. Oregon Short Line R. R. Co.*, 777.)

16. **RAILROADS — PLEADING — NAME OF NEGLIGENT AGENT.**—It is not necessary for a complaint against a railroad company, for personal injuries and injuries to personal property received by the plaintiff while crossing a street obstructed by the defendant's stationary cars, to aver the name of the defendant's servant or agent, through whose negligence the cars were allowed to stand in the street, where the plaintiff was not an employé of the company. (*Southern Ry. Co. v. Prather*, 949.)

17. **RAILROADS—RIDING UPON PLATFORM—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**—Whether a passenger, injured while riding on the platform of a railway car, was guilty of contributory negligence, is a question for the jury to determine from all the facts and circumstances of the particular case. (*Graham v. McNeill*, 121.)

18. **RAILROADS—RIDING UPON PLATFORM—LIABILITY FOR INJURY.**—If a passenger on a railway car is compelled, by reason of insufficient accommodations, to ride upon the platform, the company is answerable for injuries received by him while riding there unless he was guilty of contributory negligence. (*Graham v. McNeill*, 121.)

19. **RAILROADS—RIDING UPON PLATFORM— NEGLIGENCE.**—It is not negligence per se for a passenger to ride upon the platform of a railway car, nor is it negligence to stand upon the platform of cars in motion when there are no vacant seats inside the car. (*Graham v. McNeill*, 121.)

20. RAILROADS—RIDING UPON PLATFORM—WAIVER OF RULE.—A railway company's rule against passengers standing on the platforms of cars is waived when the company fails to provide a suitable seat for a passenger inside its coaches, and yet receives him on its train. (*Graham v. McNeill*, 121.)

21. RAILROADS—WANTON INJURY TO CHILD ON TRACK.—If a child between seven and eight years of age is upon a railway track, and a train is approaching at the rate of thirty-five or forty miles an hour, but the engineer, when four hundred yards away, discovers the child in its perilous position, and could, with due care and diligence—that is, by use of the means at his command—stop the train within two hundred yards, and thus avoid injury to the child, but, knowing this, he fails to so stop his train, the railway company is answerable if the child is struck by the train and injured. If the engineer, having in mind what to do to save the child, and having in hand the means to that end, fails to use those means, this cannot be less than a conscious failure of obvious duty in view of probable disastrous consequences, and such failure, with the probable consequences standing out before him, is, at the least, wanton and reckless disregard of the child's safety, for which the railway company would be answerable, though the child's own negligence may have contributed to its injury. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

22. RAILROADS—WANTON INJURY—DEGREE OF PROOF REQUIRED.—In an action to recover damages of a railway company for running its train upon and against a child on its track, it does not devolve upon the plaintiff to "satisfy" the jury, absolutely, of wantonness, willfulness, or intentional wrong on the part of the defendant's employes, but only to "reasonably" satisfy them. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

23. RAILROADS—WILLFUL INJURY TO CHILD ON TRACK. If a railway company runs its train upon and against a child on its track, an intent to injure, on the part of the company's employes, is not essential to liability, notwithstanding contributory negligence. It is enough if they exhibit such wantonness and recklessness concerning probable consequences as implies a willingness to inflict injury, or an indifference as to whether injury is inflicted, though they may not have any such affirmative purpose. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

24. STREET RAILWAY—DUTY TOWARD HORSE, IN ONE'S CUSTODY, ON TRACK.—When a person, having the right to do so, drives a horse upon a street railway track for the purpose of crossing it at that particular place, it becomes the duty of the motorman, not only to keep a lookout to observe him, but to run his car at such a rate of speed, on approaching the place, and to retain such control over it, that he may, if necessary, bring it to a full stop before striking the horse. (*Birmingham etc. Co. v. City Stable Co.*, 955.)

25. RAILROAD COMPANIES — STREET RAILWAYS—DUTY TO PASSENGERS.—A street railway company is bound to the observance of the highest possible diligence to protect the lives and insure the safety of its passengers, especially such as are physically diseased and infirm. It is bound to see that all passengers have alighted in safety from the car before starting again, and it is not sufficient to merely wait a reasonable time to enable passengers to alight without looking to see that this has been done, but it must see and know that all passengers intending to alight are safely off the car before starting again. (*Leavenworth Electric R. R. Co. v. Cusick*, 374.)

26. RAILROAD COMPANIES — STREET RAILWAYS—LIABILITY FOR ACT OF INTERMEDDLER.—If an intermeddler

gives the signal to start a street-car, and the conductor in charge, without seeing and knowing that a passenger, who is attempting to alight, has safely alighted before the car starts, allows it to continue in motion in obedience to such unauthorized signal, he must be held to have ratified and adopted the act of such intermeddler, and the company is liable for an injury to a passenger caused thereby. (*Leavenworth Electric R. R. Co. v. Cusick*, 374.)

27. RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR NEGLIGENCE OF EMPLOYÉ.—If, by custom among street railway employes, those on duty call for and receive assistance from those off duty, and an employé off duty undertakes to render assistance thus asked, but negligently fails to perform it, whereby a passenger is injured, the company is liable therefor, whether it knew of such custom or not. (*Leavenworth Electric R. R. Co. v. Cusick*, 374.)

28. RAILROADS—VIOLATION OF ORDINANCES—LIABILITY.—A railway company is answerable for all damages resulting proximately from its violation of valid city ordinances, made for the protection of the public, but it is not answerable for damages which do not result proximately from such cause. (*Southern Ry. Co. v. Prather*, 949.)

See Negligence, 13, 21.

RAPE.

RAPE—FEMALE UNDER AGE OF CONSENT.—The statutory offense of rape is constituted where sexual intercourse is had with a female under the age of consent, though such intercourse was not against her will. (*People v. Schoonmaker*, 560.)

See Witnesses.

RATIFICATION.

See Husband and Wife, 9, 10; Municipal Corporations, 11, 12.

REAL PROPERTY.

1. REAL PROPERTY—DANGEROUS PREMISES—INJURY TO CHILDREN—LIABILITY.—A LANDOWNER is not bound to fence or otherwise guard an open excavation or pond, natural or artificial, on his land, so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced so to do by the alluring attractiveness of such excavation or pond. (*Stendal v. Boyd*, 597.)

2. REAL PROPERTY—EXPIRATION OF LIFE TENANCY—RIGHT TO IMPROVEMENTS.—A REMAINDERMAN, in case of a life tenancy, is entitled to the property, with all improvements thereon, at the expiration of the tenancy. (*Jones v. Shufflin*, 848.)

3. REAL PROPERTY—IMPROVEMENTS—AGREEMENT BETWEEN TENANT FOR LIFE AND LESSEE DOES NOT BIND REMAINDERMAN.—The rule that fixtures erected by a tenant must be removed during the term is applied strictly as between a tenant for life, or his lessee, and the remainderman, for the latter is not bound by any agreement between the tenant for life and his lessee under which the lessee may have erected buildings on the land. (*Jones v. Shufflin*, 848.)

4. REAL PROPERTY—IMPROVEMENTS ON ANOTHER'S LAND AS PART OF THE REALTY.—If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste. (*Jones v. Shufflin*, 848.)

5. REAL PROPERTY—LEASE OF TOWN LOT BY TENANT FOR LIFE TO ANOTHER—RIGHT OF LESSEE TO REMOVE IMPROVEMENTS AFTER TENANT'S DEATH.—When a life tenant has leased to another person a town lot used only for building purposes, the lease, though unexpired, terminates with the death of the life tenant. Hence, the lessee cannot, after that time, remove buildings erected by him on the lot, without the consent of the remainderman, during the continuance of the tenancy and lease, as such buildings are a part of the realty and go to the remainderman. (*Jones v. Shufflin*, 848.)

See Building and Loan Associations, 2; Partnership, 2-6.

RECEIVERS.

1. RECEIVERS APPOINTMENT OF, PENDENTE LITE—DISCRETION.—The appointment of a receiver pendente lite is a matter committed to the sound discretion of the judge before whom the proceeding is pending. (*Cameron v. Groveland Imp. Co.*, 26.)

2. RECEIVERS—APPOINTMENT OF, PENDENTE LITE—PLEADING.—A sworn denial of the equities of a complaint for the appointment of a receiver pendente lite does not make a prima facie case for the defendant, unless the answer is a "full and responsive" one under the rules of chancery. (*Cameron v. Groveland Imp. Co.*, 26.)

3. RECEIVERS—PENDENTE LITE—AUTHORITY.—The receiver pendente lite of a corporation is simply an officer of the court, to preserve and distribute the assets of the insolvent corporation, and his powers are limited by his order of appointment and the general equity practice in such cases. (*Jackson v. McInnis*, 755.)

4. RECEIVERS—APPOINTMENT—REVIEW OF, ON APPEAL.—The appointment of a receiver will not be disturbed on appeal, unless it appears affirmatively to have been unwarranted; and to show this, there must be a clear preponderance of evidence against the propriety of the appointment, as the appellate court will not undertake to weigh the testimony where there is a substantial conflict in it. (*Cameron v. Groveland Imp. Co.*, 26.)

5. RECEIVERS FOR BUILDING AND LOAN ASSOCIATIONS WHEN NOT JUSTIFIED—NECESSITY.—A court of equity will not appoint a receiver for a building and loan association unless it is shown to be reasonably necessary. The mere fact that it has ceased to do business, and is no longer a going concern, and that the purposes for which it was organized cannot be carried out, will not justify the appointment of a receiver, on the application of one or more dissenting stockholders, when the association is already in process of liquidation. To justify the appointment of a receiver, under such circumstances, it must be shown that the method of liquidation adopted is inequitable to the plaintiffs, or impracticable, by reason of conflicting interests, or that those having charge of winding up the affairs of the corporation are unfit or improper persons for that purpose, or are unable or unwilling to act, or are pursuing a course injurious to the interests of the plaintiffs, or some other fact tending to show threatened irreparable injury to the interests of the plaintiffs. (*Sjoberg v. Security Sav. etc. Assn.*, 616.)

6. RECEIVERS—CORPORATIONS—MISMANAGEMENT, COLLUSION, AND FRAUD OF CREDITORS.—A court of equity has inherent power to appoint a receiver for the property of a corporation, at the instance of minority stockholders, where it is being fraudulently mismanaged by the officers of the company, and, by reason of such fraud, the corporation is in imminent danger of insolvency. (*Cameron v. Groveland Imp. Co.*, 26.)

7. RECEIVERS—APPLICATION FOR APPOINTMENT OF—DEFENSE TO.—Compliance with a void law does not necessarily constitute a defense to an application for a receiver. (*Sjoberg v. Security Sav. etc. Assn.*, 616.)

See Building and Loan Associations, 1, 3, 4.

REDEMPTION.

See Mortgages, 5, 6; Taxes, 9.

REFORMATION.

See Equity, 6-9; Mistake.

RELICTIION.

See Dereliction.

REPLEVIN.

1. REPLEVIN—AMENDMENT DEMANDING RETURN OF PROPERTY IS ALLOWABLE AT ANY TIME.—While a defendant, in an action of replevin, is not entitled to a return of the property unless he demands it, his answer may be amended at any stage of the case, and, when the plaintiff has obtained possession, such a demand in the answer will form a basis upon which a proper judgment may be entered. (*Aultman & Taylor Co. v. O'Dowd*, 603.)

2. REPLEVIN—FACTS PROVABLE UNDER GENERAL DENIAL.—Although the defendant, in an action of replevin, does not claim a return of the property, he may, even under a general denial, prove any facts which tend to show that the plaintiff is not entitled to the possession of the property. (*Aultman & Taylor Co. v. O'Dowd*, 603.)

3. REPLEVIN—FIXTURES—MANTELS — BATHTUB — WATER HEATER—INADMISSIBLE EVIDENCE.—If mortgagors remove from the premises a porcelain bathtub, which stands on four legs and is connected in the usual manner with the soil pipe, certain stock mantels, and a water heater connected with the building by the usual methods of plumbing, and the mortgagee brings an action to replevin the articles, claiming them as fixtures, evidence as to whether or not the house was a finished one without such articles, and that the value of the premises was impaired by the removal of the things, is immaterial, irrelevant, and inadmissible. (*Philadelphia etc. Co. v. Miller*, 133.)

4. REPLEVIN—THINGS CLAIMED AS FIXTURES—INADMISSIBLE EVIDENCE.—If mortgagors remove from the premises certain things claimed by the mortgagee to be fixtures, and who brings an action to replevin them, the intention with which the things in controversy were affixed by the mortgagors cannot be shown by proof of their homestead declaration on the premises. Such evidence is immaterial and inadmissible. (*Philadelphia etc. Co. v. Miller*, 133.)

RES JUDICATA.

See Homesteads, 1; Marriage and Divorce, 2.

RIPARIAN OWNERS.

See Waters and Watercourses, 7, 13, 14.

SAFETY DEPOSIT COMPANIES.

See Bailments, 1, 2.

SALES.

1. CONDITIONAL SALES—RESERVATION OF TITLE—ACTION FOR PURCHASE PRICE.—Under a conditional sale with reservation of title in the vendor until the purchase price is paid, and providing that upon the default of the vendee in the payment of either of the purchase money notes, the vendor may retake the property, whereupon all payments previously made shall be deemed for the use, wear, and tear of the property, and that the commencement of suit upon the notes shall not be deemed a waiver of the right to retake the property, the vendor is entitled, upon the default of the vendee, either to retake the property or to sue on the notes and retake and retain the property until the judgment is paid, but he cannot retake the property, apply one-half of its invoiced price upon the notes for its use, wear, and tear, and maintain suit for the balance. (Perkins v. Grobben, 512.)

2. CONDITIONAL SALES—VOLUNTARY PAYMENT—GARNISHMENT—ESTOPPEL.—A payment enforced by garnishment proceedings is not voluntary, and does not estop the debtor from insisting that the creditor has previously satisfied his claim by taking possession of property under a conditional sale constituting the basis of the claim. (Perkins v. Grobben, 512.)

See Agency, 1; Mandamus, 1; Specific Performance; Trusts, 3; Vendor and Purchaser.

SEDUCTION.

1. SEDUCTION—ABOLITION OF COMMON-LAW FICTION.—The common-law rule, in actions by a parent for damages for seduction of a daughter, requiring suit in the capacity of master for the loss of her services as a servant, was the rule of a legal fiction no longer obtaining under the reformed procedure. (Anthony v. Norton, 360.)

2. SEDUCTION—WHAT NECESSARY TO MAINTAIN ACTION.—In Kansas, a parent may maintain an action for the seduction of a daughter without averment or proof of loss of service or expense of sickness, and the mere fact of the emancipation of the daughter from parental control or the fact of her becoming of age does not affect the right to maintain the action. (Anthony v. Norton, 360.)

3. SEDUCTION—WHAT NECESSARY TO MAINTAIN ACTION.—An action for seduction may be maintained upon the mere relation of parent and child alone, even in a case where the daughter is of full age, lives with her parent, and constitutes a part of the family. (Anthony v. Norton, 360.)

SERVICE.

See Jurisdiction, 2.

SETOFF.

See Agency, 1-4.

SHERIFFS.

1. SHERIFFS—FAILURE TO LEVY ATTACHMENT.—THE BURDEN of showing that the defendant in an attachment suit owned property subject to levy and which the sheriff neglected to seize is upon the one who seeks to make him answer for a failure to make the levy, for the presumption is that sworn public officers have performed their duty. (Smith v. Heineman, 150.)

2. SHERIFFS—FAILURE TO LEVY ATTACHMENT—SHIFTING THE BURDEN.—If a sheriff fails to levy an attachment upon all property of the defendant subject to levy, and he is sued for such failure, evidence that several days before the levy the defendant owned more property than the sheriff afterward levied on does not create any such presumption against the officer as will shift upon him the burden of showing that his levy exhausted the defendant's property. (*Smith v. Heineman*, 150.)

3. SHERIFFS—FAILURE TO LEVY ON PARTNERSHIP PROPERTY—EXEMPTION—DEFENSE.—In an action by a creditor of a partnership against a sheriff for a failure to levy upon partnership property, the fact that one member of the firm sold his interest in the partnership assets to a copartner, and that such assets did not exceed in value the amount ordinarily exempt by law, is no defense for the reason that, in respect to partnership property, no exemption can be claimed as against partnership debts. (*Smith v. Heineman*, 150.)

4. SHERIFFS—FAILURE TO SELL OR ACCOUNT FOR PROPERTY LEVIED UPON BY ATTACHMENT.—THE BURDEN is upon the plaintiff, in an action against a sheriff for failing to sell or to account for property of the debtor levied upon by attachment, to show the extent of his damage by proof of the value of the property at the time of the levy. (*Smith v. Heineman*, 150.)

5. SHERIFFS—FAILURE TO LEVY ATTACHMENT—ENCUMBRANCE—LIABILITY.—A sheriff is not answerable for his failure to levy an attachment upon property which is mortgaged for a debt that exceeds the value of the property, for, in such a case, the plaintiff can lose nothing by the officer's failure. (*Smith v. Heineman*, 150.)

6. SHERIFFS—FAILURE TO LEVY—PRIOR ATTACHMENT—LIABILITY.—A sheriff is not justified in refusing to levy an attachment because of a prior attachment levied on the same property, where the older attachment has been discharged prior to the return of the later one. He should levy unless the property is already under seizure by virtue of older attachments sufficient in amount to absorb the proceeds. (*Smith v. Heineman*, 150.)

7. SHERIFFS—FAILURE TO LEVY ATTACHMENT—EVIDENCE INADMISSIBLE.—When a sheriff is sued for failing to levy an attachment upon the property of saloon-keepers, evidence as to whether they had taken out a license as retailers is irrelevant and inadmissible. (*Smith v. Heineman*, 150.)

See Executors and Administrators, 6.

SITUS OF DEBT.

See Attachment, 10; Garnishment, 4; Taxes, 11.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF VERBAL CONTRACT FOR SALE OF LAND MAY BE DECREED, WHEN.—A plaintiff is entitled to the specific performance of a verbal contract for the purchase of land, notwithstanding the statute of frauds, where the contract is specifically set forth, with a statement of the amount of the purchase money, and it is alleged that the purchase money was paid to the vendor, that the plaintiff was in possession at the time of the purchase, and that he has made valuable improvements upon the faith of the contract, if these allegations are sustained by satisfactory proof. (*Butler v. Thompson*, 833.)

STARE DECISIS.

STARE DECISIS.—The decisions of the supreme court of the United States are binding on the state courts when exactly the same question of a federal nature is involved. (*State v. Arnold*, 454.)

STATUTES.

1. **STATUTES, ACTION FOR VIOLATING.**—A violation of a statute or ordinance made for the benefit or protection of certain persons or classes does not give a right of action, under all circumstances, to persons or classes not within its purposes. (*Southern Ry. Co. v. Prather*, 949.)

2. **CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.**—A new statutory condition for the enforcement of a common-law right of property, such as the recovery of damages for bodily injury attributable to actionable negligence, having the effect of changing a limitation of five years to sixty-one days; and making no exception in favor of minors, does not leave a reasonable time for compliance with such condition and is unconstitutional and void. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

3. **CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.**—A law changing the time for, or conditions of, the enforcement of common-law rights are in the nature of statutes of limitation, which if of such a character as to materially affect the right itself, are within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

4. **CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.**—If a time is specified in a statute of limitations for the commencement of an action to enforce existing rights, or to comply with the new conditions specified therein, such time is conclusive, in the absence of a clear abuse of legislative discretion and disregard of constitutional rights. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

5. **CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.**—A change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement which does not allow a reasonable time within which to commence an action for such enforcement or to comply with the new condition, is unconstitutional and void as to existing rights otherwise valid. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

6. **CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.**—If a new act of limitations does not provide for existing causes of action, yet uses general language applicable to all actions, there being nothing in the act and no other law making any exception to its application, it applies to all causes of action, subject to the judgment of the court, as to such cause, whether the person affected had a reasonable time after its enactment to comply therewith. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

7. **CONSTITUTIONAL LAW—CHANGE IN STATUTE OF LIMITATIONS.**—It is within legislative power to change a statute of limitations regarding the remedy for the enforcement of existing rights, if a reasonable time is allowed to resort to existing remedies or a reasonable remedy is provided to enforce such rights. A statute which undertakes to extinguish rights of action without giving such opportunity is not deemed a statute of limitations, but an arbitrary, unlawful impairment of a constitutional right. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

8. CONSTITUTIONAL LAW—JURY TRIAL—EX POST FACTO LAWS.—A state constitutional provision dispensing with the unanimity of a jury of twelve, formerly required to convict of crime, and authorizing convictions on the concurrence of nine of the jury, is, as applied to offenses committed before such provision was adopted, an *ex post facto* law, and void. (*State v. Ardoin*, 454.)

9. CONSTITUTIONAL LAW—PATENT RIGHTS—POLICE POWER.—A statute requiring persons who sell patent rights to have written across the face of the notes executed to them in consideration therefor the words "peddler's note," is not in conflict with the patent laws of the United States, as an attempt to limit the patentee or his assignee in the disposition of the right secured to him, but is simply an exercise of the police power of the state to protect its citizens against fraud and imposition by itinerant persons. (*Bohon v. Brown*, 420.)

10. CONSTITUTIONAL LAW—QUARANTINE REGULATIONS.—A statute authorizing a state board of health to prohibit the introduction of any person coming from a foreign country into any locality of the state infected with any contagious or infectious disease is valid, and does not violate the federal immigration laws, nor the treatise of the United States with foreign countries. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

11. CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—DUE PROCESS OF LAW.—A statute authorizing a state board of health to prevent the landing by a vessel of its passengers and goods within a locality within the state infected by a contagious or infectious disease does not deprive the owners of the vessel of their liberty or property without due process of law, nor does it deny to them the equal protection of the laws. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

12. CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—INTERSTATE COMMERCE.—A statute authorizing a state board of health to prohibit the introduction of any person coming from a foreign country into any locality of the state infected with a contagious or infectious disease is valid, and does not violate the provision of the federal constitution giving Congress exclusive power to regulate commerce with foreign nations. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

13. CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—POLICE POWER.—A statute authorizing a state board of health to prohibit the introduction of any person coming from a foreign country into any locality of the state infected with a contagious or infectious disease is a valid exercise of the state police power. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

14. CONSTITUTIONAL LAW—QUARANTINE REGULATIONS—TITLE OF ACT.—A statute, entitled, "An act to carry into effect article 296 of the constitution of the state of Louisiana, in relation to boards of health, to protect and preserve the public health, to provide for the establishment and organization of a state board of health, to define its powers, and to authorize the regulation of contagious and infectious diseases," under which act the state board of health has authority to prohibit the introduction into an infected locality of persons coming from any place, whether such place or persons are infected or not, sufficiently expresses its object in its title, although the title also states that it is an act to authorize the regulation of a maritime and land quarantine against infected places. (*Compagnie Francaise etc. v. State Board of Health*, 458.)

15. CONSTITUTIONAL LAW.—STATUTES CHANGING THE CONDITION of a right of action for damages given by statute is a condition precedent to the right to such damages, hence acts directly on the right, and is not a statute of limitations in the ordinary sense of that term. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

16. CONSTITUTIONAL LAW.—STATUTES VOID IN PART.—One of two or more provisions of the same section of a statute, not dependent on each other, may be held void, and another, or the others, be held valid, but the same provision or section cannot be held both void and valid. (*Steed v. Harvey*, 789.)

17. CONSTITUTIONAL LAW.—STATUTORY RIGHTS—CONDITIONS PRECEDENT.—A statute requiring notice to be served as a condition of recovery for injury to an employé through actionable negligence of his employer, is a condition acting on the remedy alone, the right not being dependent upon the statute. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

18. CONSTITUTIONAL LAW.—STATUTORY RIGHTS—GRANT UPON CONDITION OR CHANGE IN CONDITIONS.—Statutory rights to recover for personal injury may be conferred upon such conditions as, in the wisdom of the legislature, may seem best, and such conditions may be changed from time to time, or such rights may be taken away entirely at the legislative will. They are not subject to the protection of constitutional provisions. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

19. CONSTITUTIONAL LAW. — PURELY STATUTORY RIGHTS may be, by the power conferring them, made to depend upon a new condition, or may be taken away entirely. (*Relyea v. Tomahawk Paper etc. Co.*, 878.)

20. STATUTES—CONSTRUCTION OF ACTS OF CONGRESS.—If an act of Congress, which governs a contract, has been construed by the supreme court of the United States, the decision of that court is supreme, and the state courts are bound by it; but, until it has received a construction from the highest national tribunal, the various state courts are free to exercise their own judgments in determining its effect on the contract, and the rights of the parties thereto growing out of it. (*Southern Ry. Co. v. Harrison*, 936.)

21. STATUTES—CONSTRUCTION OF ACTS OF CONGRESS—COMITY.—No principle of comity requires the courts of one state to place the same construction upon an act of Congress, with respect to its effect upon a contract, the subject matter of which is within the exclusive cognizance of federal law, as has been given to it by the decisions of the supreme court of another state, in which the contract was made. (*Southern Ry. Co. v. Harrison*, 936.)

22. STATUTES—CONSTRUCTION OF, IN PARI MATERIA.—A statute to provide for the more efficient assessment and collection of taxes should be construed in *pari materia* with an act to amend the revenue laws of the state, and this principle applies to laws concerning the equalization of assessments of property as well as to other laws. (*Ex parte Howard-Harrison Iron Co.*, 928.)

23. STATUTES — INTERPRETATION — ABROGATION OF COMMON-LAW RULES.—Courts will not extend a statute by implication in order to effect the abrogation of plain and long-established rules of the common law. (*Bandfield v. Bandfield*, 550.)

24. STATUTES—LEGISLATIVE CONSTRUCTION.—A legislative construction of previous legislation is entitled to be considered by a court in construing such legislation. (*Burridge v. Detroit*, 582.)

25. STATUTES LOSING THEIR ENACTING CLAUSE BEFORE THE GOVERNOR'S APPROVAL.—Though a statute had an

enacting clause when it passed the legislature, it is void if it had no such clause when it was presented to the governor, where the constitution requires that every law shall have an enacting clause. (*Sjoberg v. Security Sav. etc. Assn.*, 616.)

26. **STATUTES.—THE PRESUMPTION IS THAT A BILL SIGNED BY** the presiding officers of both houses of a legislature, and approved by the governor, is the bill which the two houses concurred in passing, and the contrary must be made to appear affirmatively before a different conclusion can be justified or supported. (*Ex parte Howard-Harrison Iron Co.*, 928.)

27. **STATUTES.—TO PROVE THAT A BILL APPROVED BY THE GOVERNOR IS NOT THE ONE PASSED** by the legislature, or that it is materially variant therefrom, it must be affirmatively shown by the journals of the two houses that such is the case. No other evidence is admissible, for the journals can neither be contradicted nor amplified by loose memoranda made by the clerical officers of the houses, and to which the courts cannot look for any purpose. (*Ex parte Howard-Harrison Iron Co.*, 928.)

28. **STATUTES—SILENCE OF LEGISLATIVE JOURNALS.—It** will not be presumed, from the silence of legislative journals on a matter upon which it is proper for them to speak, that either house has disregarded a constitutional requirement in the passage of an act, except in those cases where the organic law expressly requires the journals to show the action taken, as where it requires the yeas and nays to be entered. (*Ex parte Howard-Harrison Iron Co.*, 928.)

29. **STATUTES WITHOUT AN ENACTING CLAUSE.—A** requirement of a constitution that every law shall have an enacting clause is mandatory. Hence, a statute without an enacting clause, where the constitution requires one, is void. (*Sjoberg v. Security Sav. etc. Assn.*, 616.)

See Boards of Health, 3; Contracts, 1; Eminent Domain; Husband and Wife, 3, 12; Landlord and Tenant, 4; Marriage and Divorce, 3; Municipal Corporations, 8, 12; Negligence, 3, 4; Negotiable Instruments, 1; Taxes, 3.

STATUTE OF FRAUDS.

See Pleading, 4.

STREET ASSESSMENTS.

See Cloud on Title, 1, 2; Municipal Corporations, 12.

SUBCONTRACTORS.

See Mechanics' Liens, 9; Negligence, 11.

SUBROGATION.

See Banks and Banking, 2; Debtor and Creditor, 2.

SUMMONS.

See Mandamus, 3.

SUPPLEMENTARY PROCEEDINGS.

See Executions, 3-5.

SURETYSHIP.

1. **SURETYSHIP—EFFECT OF RELEASE OF SURETY ON CO-SURETY.**—If one of two sureties on a note is discharged from

liability by reason that the time of payment thereof has been extended without his consent, his cosurety is thereby released from liability for one-half of the amount of the note. (*Hallock v. Yankey*, 861.)

2. SURETYSHIP—ESTOPPEL AGAINST SURETY.—If a surety on a note, as agent for the principal debtor, requests and obtains an extension of time of payment without mentioning his liability as surety, he is estopped to assert that he is released by reason of his want of assent as such to the extension. (*Hallock v. Yankey*, 861.)

3. SURETYSHIP—RELEASE BY EXTENSION OF PAYMENT.—If the payment of a note is definitely extended in consideration of the prepayment of interest, without the knowledge or consent of a surety, he is thereby discharged from liability. (*Hallock v. Yankey*, 861.)

See Appeal, 1; Corporations, 24.

TAXATION.

See Constitutions, 6; Municipal Corporations, 2, 20, 24; Taxes, 11.

TAXES.

1. TAXES — ADDING UNAUTHORIZED COUNTY TAX TO SPECIFIC TAX—EFFECT OF.—A county has no general authority to add a county tax to specific taxes imposed by the state. Hence, a county tax cannot, in the absence of any statute authorizing it, be added to an annual privilege tax exacted of corporations doing business within the state, and the payment of a county tax cannot, therefore, be demanded as a condition precedent to the issuance of a license to such a corporation. (*Phoenix Carpet Co. v. State*, 143.)

2. TAXES — ANNUAL PRIVILEGE TAX — CORPORATION MUST PAY—EXACTION OF UNAUTHORIZED COUNTY TAX—MANDAMUS.—If a corporation doing business in this state is required by statute to pay an annual privilege tax, the corporation is not justified in doing business without a license and without payment of the tax because of the exaction of an unauthorized county tax as a condition precedent to the issuance of a license. The company's remedy is mandamus to compel the issuance of the license upon payment of the state privilege tax imposed by the statute. (*Phoenix Carpet Co. v. State*, 143.)

3. TAXES—ANNUAL PRIVILEGE TAX ON CORPORATIONS—WHAT STATUTE IMPOSES.—A statute requiring all corporations, foreign or domestic, doing business in this state, except banks and banking institutions regularly organized, not otherwise specifically required to pay a license tax, to pay "an annual privilege tax, graduated by the paid-up capital stock of the corporation," imposes a privilege or franchise tax, as distinguished from a tax on property, and is not offensive to those constitutional provisions which require equality and uniformity in the taxation of property. (*Phoenix Carpet Co. v. State*, 143.)

4. TAXES—STATUTE AS TO ANNUAL PRIVILEGE TAX ON CORPORATIONS TAKES EFFECT, WHEN—RELATION TO OTHER ACTS.—A statute requiring corporations to pay an annual privilege tax takes effect from the day of its approval, unless a different time is specified in the act. Such a tax has no relation to, or connection with, taxes imposed on licenses exacted by pre-existing

legislation, but is governed alone by the terms of the statute creating it. (*Phoenix Carpet Co. v. State*, 143.)

5. **TAXES — EQUALIZATION OF ASSESSMENT—APPEAL.**—Under the statutes of Alabama, proceedings by the county commissioners, upon assessments made by the tax commissioner, are to be had at the July term of the commissioners' court, and may be concluded at the time to which they were adjourned. Those laws also provide that an appeal may be taken by the tax commissioner in the name of the state, from the action of the commissioners' court. (*Ex parte Howard-Harrison Iron Co.*, 928.)

6. **TAXES — EQUALIZATION OF ASSESSMENT—COMMISSIONERS' COURT.**—Under the statutes of Alabama, any citizen may enter such objection to any assessment as is requisite to put into operation the powers of the commissioners' court to increase the valuation of property assessed, or the court may, of its own motion, proceed to increase an assessment. (*Ex parte Howard-Harrison Iron Co.*, 928.)

7. **TAXES IMPOSED ON A NONRESIDENT** whose property is not within the state are void. (*Liverpool etc. Ins. Co. v. Board of Assessors*, 483.)

8. **TAXES — PRIVILEGES OR OCCUPATIONS — LEGISLATIVE POWER AS TO SPECIFIC TAXES.**—The legislature must decide when and for what purpose a tax shall be levied, and must select the subjects of taxation; and specific taxes, such as those on privileges or occupations, are a valid exercise of the legislative power. (*Phoenix Carpet Co. v. State*, 143.)

9. **TAXES—SALE—NOTICE OF TIME FOR REDEMPTION.**—The statutory notice of the time within which a redemption may be made from a sale of land for delinquent taxes must be given, or served, in order to terminate the right to redeem. (*State v. Nord*, 594.)

10. **TAXES — SALE—NOTICE TO REDEEM—SUFFICIENCY OF.**—A statute providing for notice of the time when the right to redeem from a tax sale expires is mandatory, and such time must be stated clearly and correctly in the notice. The time prescribed by law must be inserted in the notice. Hence, if the time fixed in the notice is ninety days, when the statute prescribes sixty, the notice is defective and invalid, for no distinction can be made between a notice which extends the time and one in which the time is reduced. (*State v. Nord*, 594.)

11. **TAXATION—SITUS OF DEBT.**—Debts due to a nonresident, and not reduced to concrete form, have their situs at the domicile of the creditor, and not at the domicile of the debtor, for the purposes of taxation. (*Liverpool etc. Ins. Co. v. Board of Assessors*, 483.)

TAXPAYERS.

See *Municipal Corporations*, 18, 21; *Officers*, 1, 2.

THIRD PERSONS.

See *Attachment*, 1; *Ejectment*, 1, 2.

TITLE.

See *Adverse Possession*, 8; *Crops*; *Ejectment*, 1, 2; *Mortgages*, 4; *Sales*, 1; *Warehousemen*, 2, 3; *Waters and Watercourses*, 12, 14.

TORTS.

See *Husband and Wife*, 1.

TRESPASS.

1. **TRESPASS—EJECTMENT OF WIFE FROM HOMESTEAD—JUSTIFICATION.**—A writ of assistance issued in a proceeding against the husband alone, while he and his wife were occupying premises as a homestead, is no justification for the ejectment of the wife from the homestead. (*Haviland v. Chase*, 519.)

2. **TRESPASS — EVIDENCE.**—In an action of trespass *vi et armis*, based upon the forcible removal of a wife from premises occupied by herself and husband as a homestead, a writ of assistance against the husband alone, under which defendant assumed to act, is admissible in evidence, not as a justification, but as part of the *res gestae*, and as bearing on the question of damages. (*Haviland v. Chase*, 519.)

3. **TRESPASS—PUNITORY DAMAGES.**—In an action of trespass *vi et armis*, compensatory damage is the limit of recovery and punitive or vindictive damage by way of punishment cannot be awarded, although the trespass was actuated by malice or a reckless disregard of plaintiff's rights. (*Haviland v. Chase*, 519.)

See Railroads, 11.

TRIAL.

1. **TRIAL—DISMISSAL AS TO ONE JOINT DEFENDANT.** The rule that in a joint action *ex contractu* a dismissal as to one joint defendant effects a discontinuance of the entire action so as to render a judgment against the remaining defendant or defendants erroneous is subject to the exception that it does not apply when the defendant against whom the dismissal was had was not a necessary or proper party. (*Mayer v. Brensinger*, 196.)

2. **TRIAL—DISMISSAL AS TO ONE DEFENDANT—APPELLATE PRACTICE.**—If an action is dismissed as to one joint defendant, and judgment is rendered against the other without amendment of the complaint, there is a variance, to take advantage of which on appeal the defendant must specifically point out the objection in the trial court, and give the plaintiff an opportunity to amend. (*Mayer v. Brensinger*, 196.)

3. **TRIAL—EXAMINATION OF JURORS ON VOIR DIRE—CREDIT TO WITNESSES—RELIGIOUS FAITH.**—It is not proper, on the voir dire examination of a juror, to ask him whether he would give as much credit to witnesses of the Jewish faith as he would to members of any other faith. (*Horst v. Silverman*, 97.)

4. **TRIAL—EXCLUSION OF TESTIMONY IMPROPERLY RECEIVED.**—A court is not bound to persist in error. Hence, it may cure error in receiving testimony by afterward excluding it, and its right to do this is not defeated by the fact that the party injured by the admission of the testimony has been forced, because of its presence before the jury at one time, to introduce evidence which puts him at a disadvantage after such exclusion. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

5. **NEW TRIAL—DAMAGES—EXCESSIVE—WHAT IS.**—In an action against a railway company for running its train upon and against a child between seven and eight years of age, and injuring it by fracturing the outer plate of the skull, inflicting a temporary loss of speech, and rendering it unconscious for two days, a verdict for five thousand dollars damages for wanton injury of the child is excessive, and ground for a new trial, where no permanent injury was inflicted, except a slight depression in the outer plate of the skull. (*Alabama etc. R. R. Co. v. Burgess*, 943.)

6. **TRIAL—ORDER OF ADMISSION OF EVIDENCE.**—The order in which evidence shall be heard and the right of plaintiff to proceed in the first instance with evidence to anticipate the defense are matters of discretion resting solely with the trial court, and are not subject to revision or exception. (*Mayer v. Brensinger*, 196.)

7. **TRIAL—PLACE OF AS TO PERSONAL ACTION ARISING IN ANOTHER STATE.**—If a transitory cause of action arises in another state, the plaintiff has the right, in the absence of statute fixing the place of trial, to bring his suit in any county in the state where he may be, and where he finds the defendant, and in which the court may obtain jurisdiction of the defendant by service of process or by appearance. The rule is the same though one or both of the parties are nonresidents. (*Steed v. Harvey*, 789.)

8. **TRIAL—PRACTICE—RIGHT TO CONTINUANCE.**—A dismissal of the action by the plaintiff as to one of several joint defendants does not entitle the others to a postponement of the trial or to a continuance of the case. (*Baumeister v. Markham*, 307.)

9. **TRIAL—VARIANCE BETWEEN ALLEGATION AND PROOF—OBJECTION.**—If evidence of additional injury and damages not alleged is received upon the trial without objection and after cross-examination, objection to it cannot be made for the first time by a request to instruct the jury to disregard it. (*Leavenworth Electric R. R. Co. v. Cusick*, 874.)

10. **VENUE—APPLICATION FOR CHANGE OF.**—An affidavit for change of venue, based almost entirely upon hearsay, and failing to state the facts upon which the belief is based that the accused cannot have a fair trial before the court where the affidavit is presented, is insufficient. (*Schmidt v. Mitchell*, 427.)

11. **VERDICT.—IN CASES AT LAW, THE VERDICT OF THE JURY IS CONCLUSIVE,** if there is any evidence to support it. (*Beardsley v. Morrison*, 795.)

12. **TRIAL—DIRECTING VERDICT.**—The only question which the trial court can determine upon a motion to direct a verdict for the defendant is whether there is any evidence to go to the jury to support a verdict for the plaintiff. (*Cadwallader v. Hirshfeld*, 671.)

13. **TRIAL—SPECIAL FINDINGS.**—It is not error to permit the withdrawal of special questions from the jury, where it does not appear that defendant's special questions were formed with reference to those of plaintiff and allowed to be withdrawn, or that defendant was in some way prejudicially affected by such withdrawal. (*Missouri Pacific Ry. Co. v. Moffatt*, 343.)

See Attachment. 1; Instructions, 2.

TROVER.

1. **ENTIRETIES—TROVER FOR CROPS RAISED ON LAND HELD BY.**—An action of trover for crops raised upon land held by entireties, and levied upon and sold on an execution against the husband for a debt pre-existing the inception of the tenancy by entireties, cannot be defended on the ground that the land was taken under such tenancy with the intention of fraudulently avoiding payment of such debt, where the entire property was acquired subsequently to the judgment, and no attempt has been made in equity to set aside the deed to the husband and wife as in fraud of creditors, and where it does not even appear that the land held by entireties exceeds in value the statutory homestead exemption. (*Dickey v. Converse*, 568.)

2. **TROVER—WHO MAY MAINTAIN—LEVY UPON GRAIN IN WAREHOUSE.**—The owner of grain in a public warehouse having a

present right to the possession thereof may, after a demand and refusal, maintain trover against an officer who levied upon and sold the same under writ against the warehouseman, although the officer came lawfully into possession of the grain. (*Yockey v. Smith*, 288.)

TRUSTS.

1. **TRUSTS, ACTIVE—TRUSTEE BECOMES DIVESTED OF LEGAL ESTATE, WHEN.**—Whatever may be the limitations imposed by an instrument which creates an active trust, and whatever estate the trustee takes in the beginning, the legal estate in the trustee is divested out of him, and passes into the cestui que trust, upon the instant that the duties and powers of the trust, from any cause, cease to be active, or cease to require a legal title in the trustee. (*Robinson v. Pierce*, 160.)

2. **TRUST DEEDS—NOTICE OF SALE—SUFFICIENCY.**—A requirement in a trust deed of thirty days' previous notice of sale, to be given by publication in any newspaper, is complied with when such notice is published in a daily newspaper from the 25th of June to the 25th of the following July, both inclusive. (*Mallory v. Kessler*, 765.)

3. **TRUST DEEDS—SALE UNDER—ACTION FOR DEFICIENCY.**—If property is sold under a power in a trust deed, the amount realized at the sale may properly be treated as a payment on the note; and the holder may maintain an action to enforce payment of the balance remaining unpaid and unsecured, although the statute provides that there can be but one action for the enforcement of any right secured by mortgage. (*Mallory v. Kessler*, 765.)

4. **TRUSTS—POWER TO SELL INVESTS TRUSTEE WITH LEGAL TITLE.**—A power to sell an estate in fee, conferred upon a trustee by the terms of his trust, invests him with the legal title in fee, even where the trust to sell is on a contingency. (*Robinson v. Pierce*, 160.)

5. **TRUSTS — REPAIRS AND IMPROVEMENTS — PAYMENT FOR.**—Trustees to whom real property is conveyed by will to hold for the lives of certain persons in being, the income to be used, as far as necessary, to keep the property in repair and pay taxes and insurance, the balance to be paid to those having a life interest, and the corpus, at the termination of the life estate, to be conveyed to a municipality in trust, are not entitled, without express authority, to make permanent repairs or improvements on the property and to pay for them out of the corpus of the property, even with the consent of the municipality and those having such life interest, when the income from the property is ample to preserve it for the ultimate purposes named in the will. (*Estate of Cole*, 854.)

6. **TRUSTS — TRUSTEE — CONVEYANCE — BREACH OF TRUST—REMEDY OF BENEFICIARY.**—If land is conveyed in trust for the benefit of the grantor's daughter for life with remainder to certain of her children, a conveyance by the trustee, though made in contravention of the trust, passes the legal title in fee of the premises to the grantee, and the only remedy of the beneficiaries of the trust is to resort to a court of equity to compel the grantee to respect and execute the trust as the original trustee should have done. (*Robinson v. Pierce*, 160.)

7. **TRUSTS — TRUSTEE — CONVEYANCE — BREACH OF TRUST—RESORT TO EQUITY—LACHES.**—If land is conveyed in trust for the benefit of a life tenant, with remainder over to such tenant's heirs, and the trustee makes a conveyance in contravention of the trust, the right of the remaindermen to resort to a court of

equity for the protection of their interests is open to them at once without regard to the life or death of the life tenant; and a delay for a period of nearly forty years after the breach to seek such redress bars their right, although the life tenant dies within the year prior to the filing of their bill. (*Robinson v. Pierce*, 160.)

8. TRUSTS—TRUSTEE—CONVEYANCES BY, EFFECT OF.—Except as modified by statute, all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title and vest it in the grantee. (*Robinson v. Pierce*, 160.)

9. TRUSTS—TRUSTEE—EFFECT OF HIS BEING CLOTHED WITH LEGAL TITLE—REMEDY OF BENEFICIARY.—In a court of law, the trustee of a trust estate is considered to be clothed with the legal title, and, unless restrained by the terms of the trust, he may convey, assign, or encumber the trust estate. Hence, if the cestui que trust is injured by any such act of alienation, he must resort to a court of equity for relief. (*Robinson v. Pierce*, 160.)

10. TRUSTS—TRUSTEE—QUANTUM OF ESTATE TAKEN BY.—A trustee of an active trust, who is not a bare donee of a power, takes, irrespective of the estate which the instrument purports to convey, precisely that quantum of legal estate which is necessary to discharge the declared powers and duties of the trust—no more and no less. (*Robinson v. Pierce*, 160.)

11. TRUSTS—TRUSTEE TAKES FEE, WHEN—EFFECT OF CONVEYANCE BY.—If an estate is given to trustees in fee, upon trusts that do not exhaust the whole estate, and a power is super-added which can only be exercised by the trustees conveying in fee simple, the trustees will take the fee; and a conveyance by them will be sustained by the fee in them, and not by the mere power. (*Robinson v. Pierce*, 160.)

See Attorney and Client, 1; Costs, 1; Executors and Administrators, 5.

ULTRA VIRES.

See Corporations, 2, 3, 24; Municipal Corporations, 22, 23.

VARIANCE.

See Executions, 6; Trial, 9.

VENDOR AND PURCHASER.

VENDOR AND PURCHASER—VERBAL CONTRACT FOR SALE OF LAND—PURCHASER'S RIGHT AS AGAINST LIEN OF SUBSEQUENT JUDGMENT CREDITOR OF VENDOR.—A purchaser of land by parol contract, which has been so far executed as to vest in him the right to compel his vendor to execute the contract in a court of equity, has an equitable right in the land, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor. (*Butler v. Thompson*, 883.)

VENUE.

See Trial, 10.

VERDIOT.

See Trial, 11, 12.

WAREHOUSEMEN.

1. WAREHOUSEMEN—PUBLIC—WHO ARE.—One who operates two grain elevators, wherein he stores grain for compensation, is a public warehouseman within the meaning of a constitutional provision defining public warehouses as, "All elevators or storehouses where grain or other property is stored for compensation, whether the property stored be kept separate or not." (*Yockey v. Smith*, 286.)

2. WAREHOUSEMEN—TITLE TO GRAIN STORED.—Proprietors of public warehouses do not become the owners of grain stored therein, but are mere custodians, charged with the duty to restore in quantity and quality such grain as they may receive. (*Yockey v. Smith*, 286.)

3. WAREHOUSEMEN—TITLE TO GRAIN STORED—LEVY OF EXECUTION.—Grain stored in a warehouse under a contract that it shall be subject to the order and control of the depositor remains his property and cannot be seized and sold for the debts of the warehouseman, whether the warehouse be a public or private one. (*Yockey v. Smith*, 286.)

WATERS AND WATERCOURSES.

1. WATERS AND WATERCOURSES — ACCRETIONS — ISLAND CONNECTED WITH SHORE.—An island forming in a river and connecting with another island on one side is an accretion to the island with which it is connected and not to the lands on the opposite shore, although the connecting bar is sometimes free of water and sometimes submerged. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

2. ALLUVION IS LAND FORMED BY SEDIMENTARY DEPOSITS and added to an ordinary tract by the imperceptible action of waters bordering on the latter. It is a mode of acquiring property by natural law. (*Sapp v. Frazier*, 493.)

3. DERELICTION OR RELICTION IS LAND ADDED TO A FRONT TRACT by the permanent uncovering of the waters, the laying bare of the bottom by the retirement of the waters, as contradistinguished from the building up of the bottom by deposits, causing the waters to recede. (*Sapp v. Frazier*, 493.)

4. DERELICTION—WHAT NOT SUFFICIENT TO CONSTITUTE.—If parts of the bed of a lake are temporarily uncovered by the recurring flow of the waters and again covered by their annual rise and flow, there can be no dereliction. (*Sapp v. Frazier*, 493.)

5. ALLUVION—RELICTIION—WHAT NOT SUFFICIENT TO CONSTITUTE.—A riparian owner who has title to a tract of land bordering on a lake, the title to which, as well as the bed thereof, is in the public, can claim title to no part of the bed of the lake by accretion or reliction, if the original bed of such lake has undergone no change and there has been no deposit forming alluvion, nor any permanent subsidence of the waters thereof uncovering land to become dereliction. (*Sapp v. Frazier*, 493.)

6. DERELICTION—WHAT NOT SUFFICIENT TO CONSTITUTE.—The temporary subsidence of waters occasioned by the seasons, coming in winter, staying through spring, going in summer, and gone through the autumn, does not constitute dereliction in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. Where water periodically rises over land and then recedes, there is no reliction. (*Sapp v. Frazier*, 493.)

7. WATERS AND WATERCOURSES—AVULSION AND ACCRETION—RIGHTS OF RIPARIAN OWNERS.—Where a consider-

able tract of land is, by the violence of a stream, and in consequence of its cutting a new channel, separated from one tract of land and joined to another, but in such a manner that it can still be identified, the ownership of such separated tract remains unchanged; but when the change is gradual and imperceptible, except by comparisons made at different points of time, the boundary of the deprived riparian owner remains, and follows the thread of the stream. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

8. **WATERS AND WATERCOURSES — BOUNDARIES BETWEEN STATES.**—The boundary between the states of Illinois and Missouri, where separated by the Mississippi river, is the thread of the river. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

9. **WATER AND WATERCOURSES—CARE REQUIRED IN IRRIGATION.**—Canal companies are required to use reasonable skill, judgment, and care in the construction of their ditches used for irrigation purposes, and in their maintenance and repair, and like skill, judgment, and care is imposed upon the proprietors of irrigated lands in the use and control of irrigating water. If such water flows upon the surface of irrigated lands adjoining lands of another, to his injury, the person whose negligence causes or permits it must respond in damages. When the lower land becomes soaked and too wet from infiltration and percolation from irrigated land, and is thereby damaged, the upper proprietor cannot be held liable when he irrigates his land with reasonable care, using no more water than is reasonably necessary in so doing. (*Lisonbee v. Monroe Irr. Co.*, 784.)

10. **WATER AND WATERCOURSES — IRRIGATION — CARE REQUIRED.**—Irrigation companies in the care of their waters are required only to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature, and are not required to prepare to meet unlooked-for and overwhelming displays of adverse power, such as storms of such unusual violence as to surprise cautious and reasonable men. (*Lisonbee v. Monroe Irr. Co.*, 784.)

11. **WATERS AND WATERCOURSES—IRRIGATION—DISPOSITION OF SURPLUS WATER—NEGLIGENCE.**—Irrigation companies should conduct their surplus waters in suitable ditches to the source of supply, or otherwise control them, so that they may not injure the property of others, and a canal irrigating company, whose surplus ditch is inadequate and improperly maintained, is liable in damages to one who is injured by the water escaping therefrom. (*Lisonbee v. Monroe Irr. Co.*, 784.)

12. **WATERS AND WATERCOURSES—POSSESSORY TITLE OF SHORE.**—If the owner of the shore of a navigable stream acquires title only by adverse holding, he is confined to his actual occupancy on the shore, unless, by notorious acts of ownership, he furnishes evidence of his intention to claim and hold to the middle of the stream. (*Stanberry v. Mallory*, 389.)

13. **WATERS AND WATERCOURSES—RIPARIAN RIGHTS.** Under the rule adopted in Illinois, the title of riparian owners on a river extends to the thread of the stream, and their boundaries change with the shifting of the channel. (*Bellefontaine Imp. Co. v. Niedringhaus*, 269.)

14. **WATERS AND WATERCOURSES—TITLE OF RIPARIAN OWNER.**—Under a grant of land from the state on the shore of a navigable stream, the grantee owns to the thread of the stream, if not precluded by the terms of the grant. (*Stanberry v. Mallory*, 389.)

15. WATERS—USE OF STREAM FOR FLOATING LOGS—DAMAGES FOR OVERFLOWING.—Although a corporation organized for the avowed purpose of driving logs may have a statutory right to build dams across streams, whether navigable or non-navigable, and, by means of sluices, flood-gates, and locks, to discharge the water thus collected for the purpose of aiding the floatage of logs to mills and to market, this right is subordinate to that of a riparian owner below a dam to have his land free from overflow and injury caused by the company's use of the water. Hence, the company has no right to discharge the water so collected into the channel below a dam in such volume as to suddenly raise it above the usual, natural, and ordinary high-water mark, to the injury of such owner, by overflowing his land, as this would be a "taking" of the owner's land, which the company has no right to do, without his consent, or without first paying him compensation therefor. (*Carlson v. St. Louis River etc. Co.*, 610.)

WILLS.

1. WILLS—ATTESTATION—ORDER OF SIGNING BY TESTATOR AND WITNESSES.—Where a will appears on its face to have been properly executed and witnessed, it is not rendered invalid by proof that the testator signed it after the witnesses had signed, it being shown that the several acts of signing were contemporaneous and parts of the same transaction. (*Gibson v. Nelson*, 254.)

2. WILLS—CONSTRUCTION OF DEVISE.—Under a will by which the testator gives to his daughter-in-law, naming her, and to her children a certain tract of land, her children born after the death of the testator take per capita with those who were born previously to his death, if there is nothing in the will to indicate that such after-born children were intended to be excluded. (*Lynn v. Hall*, 439.)

3. WILLS — CONTESTS — JURISDICTION.—Courts of equity have no inherent jurisdiction of a bill to set aside a will or its probate. Such jurisdiction is derived exclusively from the statute and can be exercised only in the mode and under the limitations prescribed thereby. (*Storrs v. St. Luke's Hospital*, 211.)

4. WILLS — CONTESTS — JURISDICTION — LIMITATIONS. An appearance within the time limited by statute to contest the validity of a will or set aside the probate thereof is a jurisdictional fact, and is necessary to put the machinery of the court in motion, so as to contest the validity of the will. Such grant of jurisdiction is to be exercised only in case it is invoked within the time limited, and is not a limitation upon the exercise of a jurisdiction already existing. (*Storrs v. St. Luke's Hospital*, 211.)

5. WILLS—CONTESTS.—THE LAW IN FORCE at the time of the filing of a bill to set aside the probate of a will governs the jurisdiction of the court to entertain the bill, and such jurisdiction is not governed by the law in force when the will was probated. (*Storrs v. St. Luke's Hospital*, 211.)

6. WILLS—CONTESTS.—A PERSON NOT DIRECTLY AND PECUNIARILY INTERESTED in the estate of a deceased person at the time of the probate of the will of such decedent is not entitled to file a bill in chancery for the purpose of contesting the validity of such will. (*Storrs v. St. Luke's Hospital*, 211.)

7. WILLS—CONTESTS—RIGHT TO MAINTAIN, WHETHER ASSIGNABLE.—The right to maintain a bill to set aside a will and the probate thereof is not assignable, nor does it pass to an heir by descent or inheritance. (*Storrs v. St. Luke's Hospital*, 211.)

8. **WILLS—AFTER-BORN CHILDREN.**—At common law, marriage of a testator and the birth of a child after a will was made revoked the will. (Carpenter v. Snow, 576.)

9. **WILLS—OMISSION OF AFTER-BORN CHILDREN.**—Under the statutes of Michigan, if children are born to a testator after making his will, making no provision for them, unless it appears from the will that the omission was intentional, such children share in the estate the same as if the father had died intestate. (Carpenter v. Snow, 576.)

10. **WILLS—PRETERMITTED CHILD.**—Under a statute allowing a child to share in the estate of its parent as if the latter had died intestate, where such parent omits to provide in his will for such child, if it does not appear that such omission was intentional, the question as to whether or not such omission was intentional is one of fact, triable by proceeding at law. (Carpenter v. Snow, 576.)

WITNESSES.

WITNESSES—WIFE AGAINST HUSBAND—RAPE BEFORE MARRIAGE.—A wife is not a competent witness against her husband in a prosecution for rape committed upon her before coverture. Such a case does not fall within a statutory exception to the wife's general incompetency to testify against her husband, allowed where "the cause of action grows out of a personal wrong or injury done by one to the other." (People v. Schoonmaker, 560.)

See Evidence, 5; Wills, 1; Trial, 2.



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